Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1977

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

against

OVE SKOU, R. A.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MORRIS CIZNER
Attorney for Petitioners
160 Broadway
New York, N. Y. 10038

Table of Contents.

	Page
Opinions Below	3
Jurisdiction	3
Questions Presented For Review	3
Statute Involved	4
Statement of the Case	4
The Decision in Rodriguez	6
Reasons for Granting the Writ	8
Conclusion	19
Appendix A—Decision of United States Court of Appeals, Fourth Circuit	1a
Appendix B—Decision of United States Court of Appeals, Second Circuit	1b

TABLE OF CASES.

Page

Caldwell v. Ogden Sea Transport, Inc., decided March 27, 1980, not yet officially reported 8, 16

Cella v. Partenreederi M.S. Ravenna, 529 F.2d 15 (1 Cir. 1975) 15

Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956) 7, 9, 11

Edmonds v. Compagnie Generale Transatlantique, U.S. , 47 L.W. 4868 (#78-479, 6/27/79) 9, 13

Intercounty Construction Corporation, et al., v. Noah C.A. Walter, etc., 422 U.S. 1, 95 S.Ct. 2016 19

Johnson v. Sword Line, Inc., 257 F.2d 541 (3 Cir. 1958) 13

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 9, 13, 18

Potomac Electric Power Co. (PEPCO) v. Wynn, Jr., 343 F.2d 295 (D.C. Cir. 1965) 10

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956) 7

Valentino v. Rickners Rhederei G.M.B.H., 552 F.2d 446 (2d Cir. 1977) 7

STATUTES CITED.

20 C.F.R.:
Section 701.301(a) 4, 18
Section 801.2(a) 4
Section 802.2(a) 18

F.R.C.P. 17a 15
F.R.C.P. 19a 17

28 U.S.C. Section 1254(1) 3

33 U.S.C.:
Section 901 ..... 4, 8, 12
Section 908(i) 18
Section 908(i) (A) 4
Section 933(b) 3, 4, 6
Section 933(e) 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

No. .

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

against

OVE SKOU, R. A.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioners, Frederico Rodriguez, Luis Perez and Srecko Barulec, pray that a Writ of Certiorari be issued to review the decisions and judgments of the United States Court of Appeals for the Second Circuit decided March 19, 1980, affirming the orders of the District Courts for the Southern District of New York dismissing the personal injury actions brought by Petitioners against shipowners.

At the time of the argument of the appeal in the *Rodriguez v. Compass Shipping Co. Ltd.* case, in the Court of Appeals, Second Circuit, the Petitioners' Luis Perez and Srecko Barulec appeals as well as two other appeals entitled *Juan Hernandez v. Costa Armatori, S.P.A., "PIA COSTA"* and *Leonard DiFazio v. Jugoslavenska Linijska Plovidba "VISE VICA"* were consolidated for the purpose of arguing the appeals together since they all involved the same questions of law. The judgments of the District Courts with respect to all cases were affirmed for reasons stated in the *Rodriguez v. Compass Shipping Co. Ltd.* case. Judgments to that effect were entered by the Circuit Court on March 19, 1980.

Opinions Below.

The Opinion of the Court of Appeals in *Rodriguez v. Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N.* is not officially reported and is made a part of the Appendix B to this Petition. The Opinion of the United States Court of Appeals for the Fourth Circuit in the case of *Caldwell v. Ogden Sea Transport, Inc.* decided March 27, 1980 is not yet officially reported. Pertinent portions of said *Caldwell* Opinion is printed in the Appendix A to this Petition.

Jurisdiction.

The judgments of the United States Court of Appeals for the Second Circuit were entered on March 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Diversity of citizenship and damages exceeding the jurisdictional amount were the bases for Federal jurisdiction in the court of first instance.

Questions Presented For Review.

1. When there is a statutory assignment to an employer of the right to bring a third party action under Section 33(b) of 33 U.S.C. 933(b) and the employer fails or refuses to prosecute the third party action, does such failure constitute a waiver of the employer's rights under the assignment and is the right to sue deemed reassigned to the injured workman?

2. Where there is a conflict of interest between the employer and employee, and the employer fails or refuses to sue a third party for its negligence do equitable considerations require that the Act be interpreted so as to permit the injured workman to sue the third party even though more than six months elapses from the date of payment of an award in a compensation order?

3. Are the applicable purposes of the Statute 33 U.S.C. 901 *et seq.* for the employer to recoup its loss occasioned by the payment of compensation and for the injured employee to have the right to sue a negligent third party for damages and should such purposes be considered in interpreting the Act; should such purposes be considered in judging the harshness of depriving the injured workman of his right to sue and to benefit the negligent third party?

4. Does a claims examiner who is a designee of the Deputy Commissioner, not the Director of OWCP, have the power to enter a compensation order within the meaning of 33 U.S.C. 933(b) in view of 20 CFR sec. 701.301(a),801.2(a) and the 33 U.S.C. 908(i) (A)?

Statute Involved.

The statutory provision involved is the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §933(b):

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *or Board* shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Statement of the Case.

Rodriguez v. Compass Shipping is one of a group of cases in which a longshoreman brings an action to recover damages for personal injuries sustained on board shipowner's vessel due to the negligence of the shipowner. Claim was also made for Workmen's Compensation benefits.

In *Rodriguez* the accident occurred September 4, 1973. On November 4, 1974 the parties in the compensation case settled the claim at an informal conference before a claims examiner. The disposition of the claim was to be "by the issuance of a compensation order." The employer was to make payment promptly following the conference "without regard to the receipt of the formal compensation order." Such agreement was set forth in a U. S. Department of Labor form and signed by the plaintiff, his representative, the representative of the employer and the claims examiner. The latter was a designee of the Deputy Commissioner to hold an informal conference. He was not a designee of or authorized to enter an order by the Director of the O.W.C.P. Payment of the agreed-upon amount was made promptly. No formal compensation order embodying the agreement was made or filed.

On July 2, 1977 the action to recover damages was commenced against shipowner and bare-boat charterer.

In *Perez v. Arya National Shipping Line, Ltd.*, the accident occurred August 30, 1973. A compensation order was entered on March 24, 1975 and on July 7, 1976 action was commenced against shipowner.

In *Barulec v. Ove Skou R.A.* the accident occurred on January 6, 1975. A Memorandum of Informal Conference was prepared and signed by the claims examiner on February 11, 1976, and action was commenced February 22, 1978.

In all three cases the employer did not commence an action against shipowner.

In all cases defendants moved for summary judgment based on plaintiff's failure to sue within six months of the "settlement agreement" as allegedly required by 33

U.S.C. §933(b). Such motions were granted and on appeal to the Circuit Court the lower Courts' decisions were affirmed with one opinion under the title of *Rodriguez v. Compass Shipping Co. Ltd.* applying to all cases.

The Decision in *Rodriguez.*

In *Rodriguez v. Compass Shipping Co., Ltd.*, the Court held that where a Claims Examiner convened an informal conference at which the parties agreed to a settlement, memorialized on a form signed by a Claims Examiner, it was deemed an "award in a compensation order" satisfying the requirement of 33 U.S.C. §933(b). The 6-month period provision of said Section was triggered by such "award." This was held to be so even though there was no formal compensation order filed.

The Court further held that the purpose of the filing of an order was to insure that claimant-employee knew he was foregoing his right to sue. Where an employee signs a compensation agreement he is fully aware of his rights including his right to sue within six (6) months. (This holding has no basis in fact.) The failure of an administrator to comply with the formality imposed by not filing a formal order can have no significance as far as substantive rights of parties are concerned.

The Court further held that with a valid assignment, the right to sue is exclusively that of the employer six (6) months thereafter if the employee fails to sue during that time, unless within reasonable time the employer joins in the action or ratifies its commencement.

The Court strictly construed said Section 33(b) to the detriment of the employee's rights, since they did not view the six-month time bar as unreasonable or harsh. The strict construction here resulted in the benefit to

shipowners at the employee's expense and was contrary to the purposes of the act. The Court refused to apply the equitable principles set forth in *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956) claiming that the six-month provision and the 1972 Amendment eliminating the employer's liability to a shipowner under principles of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956) eliminated the basis of a conflict of interest.

The Court held however that "the employee has an interest conflicting with that of the employer, which often chooses not to antagonize its customer, the shipowner, by bringing a law suit against it. See *Valentino v. Rickners Rhederei G.M.B.H.,* 552 F.2d 446 (2d Cir. 1977)" (12b).* Despite such a finding of a conflict of interest they chose to limit *Czaplicki* to the peculiar fact situation there presented and refused to apply its equitable principles.

Of interest is the Court's admission that its decision is in conflict with the Fifth Circuit and the Circuit Court D.C. stating:

> "Although *Czaplicki* was applied in a few cases postdating the 1959 amendments to the Act, see e.g., *McClendon v. Charente S.S. Co.,* 348 F.2d 298 (5th Cir. 1965); *Potomac Electric Power Co. v. Wynn,* 343 F.2d 295 (D.C. Cir. 1965), we prefer, in view of the later changes in the Act, to treat *Czaplicki* as limited to its unique facts, which are not presented here" (13b-14b).

The Fourth Circuit in the case of *Caldwell v. Ogden Sea Transport, Inc.* (and five other cases consolidated on that

---

*Number with letters following refer to pages in Appendix A and B, annexed hereto.

appeal) was decided March 27, 1980 which is directly contrary to and in conflict with *Rodriguez*. The Second Circuit knew that the Fourth Circuit was considering its decision on its appeal a long time before *Rodriguez* was argued.

Reasons for Granting the Writ.

It is submitted that this court should exercise its discretion and grant a review on writ of certiorari because of the following special and important reasons:

There is a conflict between Circuit Courts as to the meaning and effect of 33 U.S.C. 933(b). There is also a conflict between *Rodriguez* and the Supreme Court holdings which interpret the L.H.W.C.A. as well as a conflict with the purposes of the Act. To resolve the conflict and to further the proper administration of the Act, the granting of this Writ of Certiorari is urgently requested.

The Statute provides for a statutory assignment of an injured employee's right to sue a third party six months after an award in a compensation order where he fails to sue during that period of time. It provides for an incentive to the employer to sue the third party to the extent of retaining, out of the recovery, not only its compensation lien plus attorney's fees and expenses, but also 20% of the sum collected. The employee retains the economic benefit to the balance of the recovery. 33 U.S.C. Sec. 933(e).

The Statute fails, however, to provide for the eventuality should the employer fail to sue.

Until the 1972 Amendments to the L.H.W.C.A., 33 U.S.C. 901 *et seq.*, the courts generally permitted employees to sue the third party after the six month period

from the date of a compensation order on the theory of conflict of interest between the employer and employee.

The Supreme Court in *Czaplicki v. The Hoegh Silvercloud, supra,* stated that in a very real sense the injured employee has an interest in his right of action even after it has been assigned. That normally the employee's interest would not be inconsistent with that of the assignee who would want to recoup the payments made in compensation. "In giving the assignee exclusive control over the right of action, however, we think that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interest, the inaction of the assignee operates to defeat the employee's interest in any possible recovery." In such circumstances, the Court stated that the Statute should be construed to allow the employee to enforce, in his own name, the rights of action that were his originally. Where there is a conflict of interest and inaction by the assignee, the employee should be allowed to sue since that is the proper way to insure him the rights given by the compensation act, namely, to secure his statutory share in the proceeds of any action.

The Second Circuit strictly limited an employee's right to sue to a period of six months. They ignored the purposes of the Act and that the L.H.W.C.A. should be interpreted broadly in favor of the injured longshoreman who should be permitted to prove his case against the shipowner to recover damages against him arising out of the latter's negligence or fault. See *Edmonds v. Compagnie Generale Transatlantique,* _____ U.S. _____, 47 L.W 4868 (#78-479, 6/27/79) and *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). The Second Circuit chose instead a narrow statutory construction thereby

defeating an injured employee's rights to the benefits he is entitled to under the act; relieving shipowner of its responsibility for the results of its negligence; and shifting to plaintiff, the burden of a loss occasioned by the fault of shipowner.

In *Potomac Electric Power Co. (PEPCO) v. Wynn, Jr.*, 343 F.2d 295 (D.C. Cir 1965) the Circuit Court analyzed the amended statutue post 1959. There an employee received an award in compensation and thereafter commenced an action against PEPCO two weeks before the expiration of the three year statute of limitation. PEPCO moved to dismiss the complaint claiming that by statutory assignment the employee was no longer the real party in interest as more than six months elapsed since the award. The Circuit Court denied the motion to dismiss making the following rulings:

1) The Longshoremen's and Harbor Workers' Act must be construed liberally in favor of the injured employee.

2) In 1959 the Act was amended to enlarge the rights of the employee. The amendments provided a financial incentive for the employer to take vigorous action against the third party by allowing the employer to retain one-fifth (1/5) of the proceeds recovered in excess of his expenses and lien. This financial incentive was to encourage the employee to permit assignment of his action in order to enlist the superior resources of the employer in suing the third party.

3) If the employer fails to sue after the statutory assignment, the employee should not be required to produce evidence regarding the employer's motives as such a burden would be inconsistent with the underlying

purposes of the 1959 Amendment—to facilitate the employee's recovery against the third party.

4) The statute is not designed to protect third parties from suit but an important purpose is to safeguard the employer's right to recoupment.

5) This purpose of recoupment by the employer does not require the court to penalize the employee if the employer declines to sue the third party. In effect, the employer's declination amounts to a waiver of the protection offered by the statutory assignment.

6) The Act's purposes to benefit the employee as interpreted by *Czaplicki v. The Hoegh Silvercloud,* 351 U.S.525 (1956) and supplemented by the 1959 Amendments support the view that the employee may bring suit against a third party whenever it is evident that the employer, for whatever reason, does not intend to bring suit.

7) There is no reason in law or equity why an injured employee's rights against a tort feasor should be sacrificed on the alter of the employer's self interest.

In commenting on the Supreme Court's decision in *Czaplicki, supra,* the Circuit Court in *PEPCO* said that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee. Where there is a conflict and inaction by the assignee, the employee can maintain the third party action himself.

It should be noted that the Senate Committee Report 92-1125 pertaining to the 1972 amendments to the Longshoreman and Harbor Workers' Act at page 3 reports that there was some discussion with respect to continuing said Act as the Workmen's Compensation statute

covering workmen employed in private industry in the District of Columbia. The Committee Reports state that representatives of such employees stated that these workers desired to continue coverage under said Act. By its action, Congress agreed.

The D.C. Circuit Court has within its district possibly the greatest number of employees affected by this Act. It therefore had more than just a passing interest in the matters discussed in Potomac. That case was decided in 1965 and was in effect and the prevailing law in 1972. When the hearings were held on the question of amending 33 U.S.C. 901, et seq., Sec. 933(b) pertaining to the statutory assignment was not changed and it must have been assumed that the interpretation of that section was as set forth in *PEPCO*.

It was surely not within the contemplation of all parties concerned with the amendments to the Act that a new interpretation would be given to the statutory assignment and the effect of the conflict of interest. The change from *PEPCO* to *Rodriguez* has deprived injured employees of a substantial right. There has been much said and written of the compromises resulting in the Amendment to the Act in 1972. There is constant reference to a quid pro quo. Nothing at any time was said of a quid pro quo for the giving up of such substantial right.

The courts had held that an employee may sue shipowner as long as there is no formal order and as long as the employer indicates that he will not sue or act upon the statutory assignment. Everyone assumed that the law was fixed and changes would be statutory in nature—open and known. The employees of the District of Columbia actually requested their Workman's Compensation coverage be continued under the Act. To now find that workmen have lost an established right when no such loss

was contemplated or intended at the time of the Amendment, is to destroy the foundation of statutes based on compromise. The District of Columbia workers had a right to assume that under the Act they would continue to have their rights as set forth in *PEPCO*. If a loss of such rights was involved, they would not have expressed a desire to continue to be covered by the Act and at least would have said something about it in opposing such change.

The Supreme Court in *Edmonds v. Compagnie Generale Transatlantique, supra,* pointed out that the legislative history of the Act strongly counsels against the modification of longshoremen's pre-existing rights against the negligent vessel. The questions presented here in this petition were not raised at the time of the debates leading to the 1972 Amendments.The Court then quoted from *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977) at 278-279:

> "Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial act. . . '

The Court in *Edmonds* likewise held that a court changing what Congress understood to be the law and which it did not wish to modify might disturb the delicate balance of the compromises arrived at resulting in the 1972 Amendments. The courts should, therefore, stay their hand under such circumstances, since one must presume that Congress acted with the existing state of the law in mind and not the probability of future judicial change.

The Third Circuit in *Johnson v. Sword Line, Inc.,* 257

F.2d 541 (3 Cir. 1958) held that where no satisfactory reasons for an employer's inaction was shown, a conflict of interest would have to be presumed and, therefore, the statutory assignment was not a bar to the employee's action.

By the passage of the 1972 Amendments, Congress did not intend the result claimed by the Second Circuit here. Actually, the Court's opinion and conclusion is contrary to Congressional intent. The Senate Committee report states at page 11 that a vessel may not, by contractual agreement or otherwise, require the employer to indemnify it in whole or in part for damages for which it is liable to an injured workman; that vessels by their superior economic strength could circumvent and nullify the provisions of the Act by requiring indemnification from a covered employer for employee's injuries.

Thus, the economic relationship which results in a contribution from stevedore to shipowner, as here, and penalizes the longshoreman in the process is against public policy and void.

The Congressional Committee reports and statute recognize shipowner's economic power over the stevedores and in legislating that there should be no indemnity or contribution by stevedore to shipowner, made it clear that there should be none directly or indirectly.

Despite the foregoing shipowner is indirectly receiving contribution, contrary to law as a result of stevedore's failure to sue. Despite the foregoing the economic power wielded by shipowners makes stevedores not sue under the statutory assignment. The court in *Rodriquez* found that because of the economic relationship between shipowner and stevedore, the latter would not sue. Since the longshoreman has an 80% interest in the recovery (after

payment of the lien and expenses) a conflict of interest does exist between employer and employee.

In *Cella v. Parternreederi M.S. Ravenna,* 529 F.2d 15 (1 Cir. 1975) the First Circuit stated the sense of the statutory purpose to be:

> "—to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act." *Cella, supra,* 529 F.2d at 20.

Perhaps the most surprising thing of all is that under the foregoing, with the statutory purposes and objectives clearly spelled out, the steamship company still seeks to benefit at the expense of the longshoreman and stevedore by undercutting Congressional intent and statutory purpose and the Second Circuit upholds them in doing so. Shipowner is the one that claims that plaintiff lost his rights to sue defendant and that the stevedore is the only one that can sue—knowing full well that stevedore will never sue—or more correctly, dare not sue. It is stevedore that has the right to intervene in the action and to raise the question of assignment of the cause of action. Shipowner is not the third party beneficiary for such assignment. By Act of Congress they are liable for their negligence without any foreshortened Statute of Limitations whether sued by the longshoreman or the stevedore. They seek to choose their adversary. They should not, under these circumstances, have the right to make such choice by raising the question of assignment to defeat a longshoreman's claim.

If they seek to protect themselves from a multiplicity of lawsuits, they should move to join the employer in the action under F.R.C.P. 17a.

The *Rodriguez* opinion and decision came down on March 19, 1980. Eight days later on March 27, 1980, the Court of Appeals, Fourth Circuit, decided *Caldwell v. Ogden Sea Transport, Inc.*, a post 1972 Amendment case (1a-12a). It involved the identical questions of law decided by the Second Circuit in *Rodriguez*. The Fourth Circuit took the diametrically opposite position as to the purpose of the Act, the equitable considerations to be applied, the philosophy of the law involved, and the conclusions reached as to the interpretation and application of the Act and in particular, Section 933(b) thereof. It refused to restrict *Czaplicki* to its peculiar facts.

The Fourth Circuit stated:

> "LHWCA should be interpreted broadly in favor of the injured longshoreman. *E.g., Voris v. Eikel,* 346 U.S. 328, 333 (1953). One of its objectives is to place "the burden ultimately on the company whose default caused the injury," *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964), and a negligent shipowner would seem to have no complaint if that burden is placed upon it by the longshoreman rather than the employer or its insurer" (2a).

Where there is a statutory assignment to the employer, the statute does not deal directly with a solution to the problem where the employer fails to bring an action.

> "*While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply through inaction of the assignee until the claim is barred from*

> *prosecution by anyone.* What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason" (8a-9a). (Italics supplied.)

The Fourth Circuit did not reject or restrict *Czaplicki* as the Second Circuit did but sought to apply its equitable principles. The Court stated:

> "The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue" (11a).

The Court then directed a method of procedure to effectuate its opinion whereby the assignee would be joined as an involuntary plaintiff under F.R.C.P. 19 (a). (Under *Rodriguez* such procedure would not be employed.)

Thus the views expressed in *Caldwell* (4 Cir.) are in conflict with those expressed in *Rodriguez* (2 Cir.).

At this point it should be noted that in *Northeast Stevedores v. Caputo, supra,* this Court stated that the Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results. The Second Circuit ignored the purposes of the

Act; created a result relieving shipowner of the consequences of its negligence and then stated categorically that limiting the injured employee's time to sue to six months is not harsh,—even if the employer fails to sue thereafter. His substantive rights to recovery from the third party are simply lost by the mistaken belief that such loss is not harsh. Thus, by narrow statutory construction, ignoring the purposes of the Act, the injured employee is deprived of his claim for damages against the third party. The Second Circuit's interpretation of the Act makes it become a statute protecting the steamship company whose fault caused the accident and who by economic means, controls the actions of the stevedore, to the detriment of the injured longshoreman, contrary to Congressional intent.

Thus the conflict between the Second Circuit on one hand and the Third, Fourth, Fifth and D.C. Circuit Courts on the other is sharp and complete. To avoid the harsh result decreed by the Second Circuit and to make the Circuit Courts comply with the purposes of the Act as suggested by *Northeast Stevedores v. Caputo, supra,* the Writ of Certiorari requested herein should be granted.

Although the effect of the conflict of interest on the application of the Statute is overriding, the administration of the Act is vitally affected by the holding of the Second Circuit that a claims examiner may enter a compensation order. It is contrary to the Federal Regulations and the Act. See 20 C.F.R. 701.301 (a); 802.2 (a) and 33 U.S.C. 908 (i). While the Director of the O.W.C.P. may authorize anyone to enter an order, the Deputy Commissioner who has the right by statute to enter an order may not authorize anyone else to do so for him. The Court in *Rodriguez* confused the Director with the Deputy Commissioner. In *Rodriguez* the claims examiner was not authorized by the Director to enter an order. We have, therefore, no triggering of the six-month period for a statutory assignment.

Nor should an off-hand report of a settlement be considered an order which has considerable import. See *Intercounty Construction Corporation et al. v. Noah C.A. Walter, etc.*, 422 U.S. 2, 95 S.Ct. 2016.

Conclusion

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should issue to review and reverse the decision below.

Respectfully submitted,

MORRIS CIZNER,
Attorney for Petitioner.

APPENDIX A.

Decision of United States Court of Appeals, Fourth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1257

CHARLES A. CALDWELL,

Appellant,

—versus—

OGDEN SEA TRANSPORT, Inc.,

Appellee.

No. 78-1258: Wilbert C. Harold, Appellant, versus Companhia De Navegacao Maritima Netumar, Appellee.

No. 78- : Melvin Bandy, Appellant, versus Bank Line, Ltd., Appellee.

No. 78-1455: James Braithwaite, Appellant, versus Moore-McCormack Lines, Inc., Appellee.

No. 78-1505: Wallace Curry, Appellant, versus Compania Crasatlantica Espanola, S.A., Appellee.

No. 78-1653: William Edward Sweeney, Appellant, versus Gotaas-Larsen Argentina, S.A., etc., *et al.*, Appellees.

Argued March 6, 1979 Decided March 27, 1980

Before

WIDENER and PHILLIP, Circuit Judges, and ROBERT R. MERHIGE, District Judge, sitting by designation.

C. Arthur Rutter, Jr., John H. Klein (Breit, Rutter & Montagna on brief), Burt M. Morewitz (Marshall, Blalock, Garner & Millner, W. Glover Garner, Jr.; Arthur C. Ermlich and Melvin J. Radin on brief) for Appellants; John B. King, Jr. (Vandeventer, Black, Meredity & Martin on brief), John R. Crumpler, Jr. (Seawell, McCoy, Dalton, Hughes, Gore & Timms on brief), Richard Wright West for Appellees.

* * *

II.

The longshoremen next contend that the right of action on the third person claim should be deemed concurrently held by longshoremen and subrogated insurers after passage of the six months limitation period. Were we writing on a clean slate, strong policy considerations might be found to support such a position. LHWCA should be interpreted broadly in favor of the injured longshoreman. *E. g., Voris v. Eikel,* 346 U.S. 328, 333 (1953). One of its objectives is to place "the burden ultimately on the company whose default caused the injury," *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964), and a negligent shipowner would seem to have no complaint if that burden is placed upon it by the longshoreman rather than the employer or its insurer. Courts have construed roughly comparable language in state workmen's compensation statutes to create a concurrent right to proceed against a third party tortfeasor. *E.g., Parkhill Truck Co. v. Wilson,* 190 Okla. 473, 125 P.2d 203 (1942). *See generally* 2A A. Larson, *The*

Law of Workmen's Compensation § 75.40 (1974). Indeed, cases under LHWCA itself arguably may have taken such a position. *See Clark v. Hutchinson,* 161 F. Supp. 35 (D.C.Z 1957); *cf. Potomac Electric Power Co. v. Wynn,* 343 F.2d 295 (D.C. Cir. 1965) (per curiam) (longshoreman may sue when "for any reason" stevedore or its insurer does not).

Be that as it may, we conclude that the history of the legislation we apply precludes that interpretation. We do not write on a clean slate. While the longshoreman's right of action against negligent third persons has always been protected by LHWCA, he was required under the original version to elect between compensation or a right of action against the third party.[3] When the longshoreman elected compensation, he gave up any interest in the third party action or control over it. *Hunt v. Bank Line, Ltd.,* 35 F.2d 136, 137 (4th Cir. 1929). Absent such a formal election he could in theory also have pursued his third party claim, but the original version of § 933(b) made this impossible.[4]

[3]As originally enacted, and until 1959, § 933 (a) read:

> If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commisioner in such manner as the [Secretary of Labor] may provide, to receive such compensation or to recover damages against such third person.

Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33 (a), 44 Stat. 1424, 1440 (1927).

[4]The original § 933(b) provided:

> Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person whether or not the person entitled to compensation has notified the deputy commissioner of his election.

Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33(b), 44 Stat. 1424, 1440 (1927).

The courts held that the mere acceptance of compensation, even without a formal election, effected an assignment of the right of action to the employer. *E.g., Toomey v. Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941). *But see Johnsen v. American-Hawaiian S.S. Co.*, 98 F.2d 847 (9th Cir. 1938).

In 1938, Congress acted to mitigate this deficiency. Section 933(b) was amended to provide that an assignment would occur only if the compensation was accepted "under an award in a compensation order filed by the deputy commissioner."[1] The amendment was successful in that the longshoreman who did not file a formal election and merely received voluntary payments without an award was thereafter allowed to pursue his third party claim. *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 456 (1947).

The statute was not yet completely functional, however, for as a practical matter the longshoreman was still compelled to look essentially to the compensation payments. Third person liability was uncertain and always delayed. The longshoreman was entitled to the difference between any recovery obtained by the assignee and the amount paid under the Act plus the litigation expenses, Act of June 25, 1938, ch. 685, § 12, sec. 33(e), 52 Stat. 1164, 1168, *amending* Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33(e), 44 Stat. 1424, 1440-41 (1927), but the assignee as it still can, could settle the claim

---

[1]From 1938 until 1959, § 33(b) provided:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164, 1168.

for its outlay without the consent of the longshoreman, 33 U.S.C. § 933(d), and there was no incentive for it not to do so. *See* S. Rep. No. 428, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Ad. News 2134.

In 1959, therefore, Congress again amended § 933 to its present form to eliminate the election requirement under subsection (a), to postpone the assignment under subsection (b) until six months after acceptance of compensation under an award, and to give twenty percent of any excess recovery by the assignee to the assignee as incentive to bring the third party action. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391.

If, as appellants contend, the right of action against third person tortfeasors becomes concurrent when the assignment occurs, much of this legislation was unnecessary. The 1938 amendment adding the award requirement to § 933(b) need never have been enacted; the judicial decisions barring suit by the longshoremen before that amendment were incorrect; and the 1959 amendment postponing the assignment six months was essentially superfluous. On balance we conclude that whatever might be the merits of a concurrent right of action approach, LHWCA will not yield that interpretation.

III.

The longshoremen next contend, in a fall back position from the two just discussed and rejected, that where a conflict of interest on the part of an assignee of the third person claim can be shown, the right of action should be deemed reassigned to the longshoreman. The district court held, relying on *Czaplicki v. The Hoegh Silvercloud,* 351 S. 525 (1956), that proof of such a conflict of interest could have this effect, but that the burden of proof to

establish the conflict should be borne by the longshoreman. When none of the longshoremen, despite opportunity given to carry this burden, was found to have done so, judgments for the third person defendants of course followed.

On this appeal the longshoremen urge that a presumption of conflict should arise from the mere failure of an assignee to bring a third person action, thereby imposing upon the third person when sued the burden of negating the existence of a conflict. To the contrary, defendants here contend that the conflict of interest principle announced in *Czaplicki* should be considered abrogated by subsequent legislation in 1959 and 1972 which, by removing existing disincentives for assignees to prosecute third person claims, effectively removed the originally felt need for the amelioration that *Czaplicki* provided.

We agree with the longshoremen and the district court that the *Czaplicki* doctrine has not been undercut by subsequent legislation.[6] But we consider its conflict of interest principle as applied by the district court to be so

---

[6]The argument that the 1959 and 1972 amendments have *sub silentio* abrogated *Czaplicki* are based on the assumption that the decision was justified only by certain disadvantages for longshoremen theninherent in LHWCA that have since been removed by these amendments. The 1959 amendment postponed the assignment for six months and gave assignees an added incentive to prosecute claims by providing them a bounty of twenty percent of any excess recovery. Act of August 18, 1959, Pub. L. No. 86-171, §33(b), (e), 73 Stat. 391. The 1972 amendments removed critical disincentives to suit by assignees by abolishing the breach of warranty claims against employers by shipowners and longshoremen that were then available under *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and *Reed v. The Yaka*, 373 U.S. 410 (1963). *See* 33 U.S.C. §905(b). With the district court in the instant cases, we do not consider the *Czaplicki* principle to have been rendered unnecessary by these amendments. While both undoubtedly improve longshoremen's chances of recovery on third person claims in the aggregate of compensation cases, neither solves the problem of assignee inaction when it occurs in a particular case.

demonstrably ineffectual to carry out the purposes of LHWCA in respect of third person claims that it must be reassessed. When this is done, we think that a solution building upon the underlying *Czaplicki* principle but more fairly serving the various individual interests as well as the purposes of LHWCA is readily found within broader, traditional principles of subrogation and real party in interest doctrine.

The ineffectiveness of specific conflict of interest principles as applied in these cases and the more appropriate solution available within established doctrine may be illustrated by analyzing the practical problems faced by both longshoreman, assignee, and third person after statutory compensation has been paid under the Act. At this point both longshoreman and assignee of course have an interest in realizing on any claim that may exist against a negligent third person: the assignee to recoup, the longshoreman to recover amounts in excess of, compensation paid. The third person presumably has no substantial interest in the identity of the ultimate claimant, but does have an interest in facing only one action. Were the statutory assignment scheme not in play, both parties might be considered "real parties in interest" under traditional subrogation principles, and the rights *inter se* of these two and any third person target of suit would be adequately served by well-developed principles that protect the third person against multiplicity of actions while safeguarding the separate substantive claims of the claimants. *See generally* 6 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 1545, 1546. But the assignment-subrogation scheme of §933 of course operates precisely to alter that normal three-way relationship resulting from subrogation in respect of third person claims. Under §933 the longshoreman is made the sole real party in interest for six months; the assignee the sole real party in interest thereafter. This statutory scheme assumes that in the normal course a longshoreman with a

meritorious third person claim will know of it and will make a considered decision either to prosecute it for the joint interests as the statutory real party in interest during the six months period or to defer to the assignee as successor real party in interest. It further assumes that in the normal course an assignee will within the statutory limitation period prosecute for the benefit of both any claim not prosecuted by the longshoreman. To encourage realization of this latter expectation, LHWCA now provides a financial incentive to the assignee to prosecute the action, and has removed the former disincentives to suit resulting from judicial glosses on the Act.[7] Ordinarily, therefore, it is likely that the interests of both longshoreman and assignee in having their substantive rights pursued and of the third person in facing a single action will be achieved under LHWCA.

But LHWCA does not yet deal directly with certain practical problems that may interrupt or wrench these expectations. These can arise whenever by design or inadvertence the longshoreman fails during the statutory period to prosecute the claim while the right of action is exclusively his. Following this failure, the assignee may, for a variety of reasons, not then itself prosecute the claim. It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar. Under all of these, and to precisely the same degree under all, the longshoreman faces a practical problem for which LHWCA provides no direct solution: forcing action by the assignee, or somehow retrieving the right of action. While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply

[7] *See* note 6, *supra*.

through inaction of the assignee until the claim is barred from prosecution by anyone. What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason.

The concurrent right of action approach taken by some courts is an attempted solution along these lines. As indicated in Part II, we do not think the legislative history of LHWCA permits finding such a solution within the Act. Furthermore, a truly concurrent right possessed by the longshoreman would be in derogation of the normally justifiable right of the assignee, who usually has the greater substantive interest at stake, to maintain exclusive control over the action.

The conflict of interest principle found in *Czaplicki* is another possible basis of solution. It has proven however to pose two problems that have made it difficult of general application. The first is substantive: its implication that the conflict of interest must be one specifically related to the assignee's relationship with the third person. The second is procedural: the problem of allocating proof on the issue of the assignee's conflict of interest as between the longshoreman and the third person, the actual litigants in the third person action. On its facts, *Czaplicki,* origin of the principle, simply did not encounter either of these as significant problems. Substantively the conflict of interest in *Czaplicki* was the clearest conceivable: the assignee insurer was also insurer of the third person shipowner. Procedurally, because the existence of conflict was manifest as a matter of law, no problem of factual proof was presented.

Courts attempting to apply the *Czaplicki* principle in situations less clear in either substantive or procedural terms have foundered in the effort to find in it a general

solution to the problem. To the extent it was going to require a specific conflict of interest in the sense that affirmative interest by the assignee in protecting the third person, it could not of course reach mere disinclination of the assignee to sue because of expense or doubt as to the merits, of failure to sue because of negligence or inadvertence.[8] To the extent a conflict was not manifest in the circumstances but required factual proof, the problem of allocating to either longshoreman or third person the burden of proving another's state of mind has presented obvious and possibly insurmountable difficulties.[9]

---

[8]While the district court in the instant cases rejected the notion that *Czaplicki* had been utterly abrogated or that its principle should be confined to its narrow facts of identity of insurers of employer and third person, it clearly thought that only a specific conflict of interest could suffice to revest the right of action in the longshoreman. *See also McClendon v. Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965). *But see Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295 (D. C. Cir. 1965) (revested if "for whatever reason" assignee does not sue; *semble*).

[9]Courts addressing the problem have simply divided on the appropriate allocation. The Third Circuit in *Johnson v. Sword Line, Inc.*, 257 F.2d 541 (3d Cir. 1958), suggested, somewhat ambiguously it must be conceded, that the assignee (a non-party?) should bear the burden. Subsequent cases have read through the ambiguity an implied holding in *Johnson* that the burden of proof should be carried by the third person tortfeasor. *See Smith v. A.H. Bull S.S. Co.*, 208 F. Supp. 172, 177 (D. Md. 1962) (following *Johnson*). *See also Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295, 198 (D.C. Cir. 1965) (*semble*, if any degree of conflict need be proved burden should be upon defendant). On the other hand the district court in the *Bundy* case involved in this appeal held that the burden of proving conflict of interest should be carried by the longshoreman attempting thereby to overcome the statutory assignment. *Bandy v. Bank Line, Ltd.*, 442 F. Supp. 882, 887 (E.D. Va. 1977). Several courts have followed *Bandy*. *Rodriguez v. Compass Shipping Co.*, 456 F. Supp. 1014, 1023 (S.D.N.Y. 1978); *Tagliarini v. McAllister Lighterage Lines, Inc.*, Ind. No. 20915177 (N. Y. Sup. Ct., N. Y. County, Mar. 19, 1979).

This divergence of views on so critical a point simply reflects the inherent difficulty in placing upon either party to litigation the decisive burden of proving the motivation for inaction of a non-party. *See, e.g., McClendon v. Charente S.S. Co.*, 348 F. 2d 298, 303 (5th Cir. 1965); *Smith v. A.H. Bull S.S. Co.*, 208 F. Supp. at 177.

As indicated, we think that a solution building on the fundamental point in *Czaplicki,* but avoiding both of these problems is readily at hand. The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue, and that a deliberate decision by the latter to forego the exclusive right to control prosecution of the claim must reflect a knowledgeable relinquishment of right.

Taking this as the root *Czaplicki* principle, only two things need be done to invoke its application in a particular case. The longshoreman must formally signal to the assignee a desire to have the claim prosecuted by the latter at peril of having the exclusive right of action revested in the former, and the assignee must in return formally signal its disinclination to prosecute the action.

The practical and procedural means for realizing these are also readily found. A longshoreman desiring to force decision can of course first proceed extra-judicially to request action by the assignee or, as an alternative, formal reassignment of the right of action. As we indicate in Part IV of this Opinion, a formal reassignment will be effective to revest the exclusive right of action in the longshoreman. If this fails, the longshoreman may commence an action on the third person claim in his own name, as was done in the actions before us. In this action he may join the assignee as an involuntary plaintiff, Fed. R. Civ. P. 19(a), alleging the essential facts of the three parties' relationship, and praying that the assignee assume exclusive con-

trol of the action's prosecution.[10] A specific refusal in a responsive pleading to assume control, or a failure specifically to respond to this prayer for relief may fairly be treated as a reassignment in accordance with the equitable considerations underlying the *Czaplicki* principle. If the assignee on the other hand asserts by responsive pleading an intention to assume control of the prosecution, this should be taken to constitute acceptance of an obligation to prosecute it in diligence and good faith.

Because we conclude that invocation of the *Czaplicki* principle should not depend upon proof of the existence of a specific conflict of interest, the judgment entered on that basis in favor of the defendants in each of the instant actions must be vacated and the actions remanded for further proceedings. Upon remand, all plaintiffs covered by LHWCA may, if so disposed, amend their complaints to add as involuntary plaintiffs the subrogated assignees in their respective actions, and thereafter may proceed in accordance with the procedures outlined in this opinion.[11]

---

[10]It is of course possible that in an occasional case territorial limitations on jurisdiction will prevent joining the assignee as a formal party. In such a case documented extra-judicial notice with fair opportunity to respond may fairly serve the purpose by analogy to traditional vouching-in procedures. Formal joinder is so much better adapted for a variety of reasons that a court might well insist upon its use whenever available. We leave that problem to another day.

[11]The relation back provisions of Fed. R. Civ. P. 17(a) are available to resolve any problem arising from late joinder of the real party in interest.

APPENDIX B.

Decision of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 362—September Term, 1979

(Argued December 6, 1979 Decided March 19, 1980)

Docket No. 79-7132

FREDERICO RODRIGUEZ,

Plaintiff-Appellant,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,

Defendants-Appellees.

Before:

WATERMAN, MOORE, and MANSFIELD,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, entered by Judge Robert L. Carter, dismissing a personal injury action by a longshoreman against a shipowner and bareboat charterer on the ground that the plaintiff had, pursuant to a settlement agreement with his employer, approved

by a claims examiner of the Department of Labor, received workmen's compensation pursuant to the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. §§901, *et seq.*, and by failing to bring suit against the defendants within six months thereafter assigned his rights to his employer under § 33 (b) of that Act, 33 U.S.C. § 933(b).

Affirmed.

MORRIS CIZNER, Esq., New York, NY (Zimmerman & Zimmerman, New York, NY, of counsel), *for Appellant.*

JOSEPH T. STEARNS, Esq., New York, NY (William J. Blumenschein, Esq., Walker & Corsa, New York, NY, of counsel), *for Appellees.*

MANSFIELD, *Circuit Judge*:

This is one of a series of personal injury actions by longshoremen against shipowners or charterers, nearly all of which have been dismissed by district courts pursuant to § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 933(b) on the ground that since the plaintiff in each case settled a compensation claim filed by him against his employer (a stevedoring company) under the Act, accepted the agreed-upon sum, and failed to sue the shipowner until more than six months after the settlement award, he lost his right to assert the claim which was by operation of § 33(b) automatically assigned to

his employer. See also *Panzella v. Skou*, 471 F. Supp. 303 (S.D.N.Y. 1979); *Francavilla v. Bank Line, Ltd.*, 470 F. Supp. 94 (S.D.N.Y. 1979); *Perez v. Arya National Shipping Line, Ltd.*, 468 F. Supp. 799 (S.D.N.Y. 1979); *Hernandez v. Costa Armatori*, 467 F. Supp. 1064 (E.D.N.Y. 1979); *Perez v. Costa Armartori*, 465 F. Supp. 1211 (S.D.N.Y. 1979); *Bandy v. Bank Line Ltd.*, 442 F. Supp. 882 (E.D. Va. 1977).

Section 33(b) provides that

> "(b) Acceptance of [statutorily fixed] compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

An employer successfully bringing suit against a third party following a statutory assignment must pay the proceeds to the employee; keeping for itself the amount of compensation it paid, attorney's fees, and 20% of the balance. 33 U.S.C. § 933(e). If the employee brings suit himself, he must repay his employer out of the proceeds, retaining the balance of the damage recovery. *The Etna*, 138 F.2d 37, 41 (3d Cir. 1943).

Plaintiff contends that since his claim under the Act was not the subject of a formal compensation order filed by the deputy commissioner or Board no assignment occurred and his action is neither precluded nor time-barred. He further argues that, even assuming an assignment, since the employer has no intention of prosecuting the claim against the shipowner any as-

signment of his claim under the terms of the Act must be treated as null and void because of a conflict between his interest and that of his employer. We disagree on both counts and affirm.

On September 4, 1973, plaintiff, a longshoreman employed by the stevedoring company International Terminal Operating Co., Inc. (International), was injured while unloading the S.S. South Breeze, docked in Brooklyn, which was owned by Compass Shipping Company and operated by Djakarta Lloyd as bareboat charterer. Pursuant to § 5(b) of the Act, 33 U.S.C. § 905(b), he filed a workmen's compensation claim against his employer International, which was self-insured, with the Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor. The statute provides for compensation in fixed amount by the employer regardless of fault.

Under regulations implementing the Act, see 20 C.F.R. §§ 702.311-314, a claims examiner employed by the Department of Labor convened an informal conference. At the conference plaintiff and his employer reached an agreement settling plaintiff's claim, which was then memorialized in a written agreement dated November 4, 1974, on an OWCP form regularly used for this purpose. Plaintiff was represented by counsel throughout the OWCP proceedings, the employer had its representative, and the matter was handled by the claims examiner pursuant to 20 C.F.R. § 702.312 which authorizes an informal conference to be called by the deputy commissioner or his designee. Title 20 C.F.R. § 702.312, which has since been revised, provided:

> "§ 702.312 Informal conference; called by and held before whom.

"Informal conferences shall be called by the deputy commissioner or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the deputy commissioner."

The settlement agreement was signed by the plaintiff, his representative, the employer's representative and the claims examiner. The parties agreed as to the extent of plaintiff's disability, the amount of money due him and the amount of his counsel's fee. Payment of the agreed-upon amount was made promptly by the employer to plaintiff pursuant to the terms of the agreement. Title 20 C.F.R. § 702.315, as it read at the time of the settlement, obligated the employer to commence paying the compensation benefits immediately, without regard to whether the deputy commissioner, acting personally or through his designee, see 20 C.F.R. § 702.312, *supra*, had filed a formal compensation order, which he was required to do. Title 20 C.F.R. § 702.315 provided:

"§ 702.315 Conclusion of conference agreement on all matters with respect to the claim.

"(a) Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall embody the agreement in a formal compensation order, to be filed and mailed in accordance with § 702.349. Where the problem was of such nature that it was resolved by discussion by telephone or by exchange of written correspondence, the parties shall be notified by the same means that agreement was reached and then

> the deputy commissioner shall proceed to prepare, file and mail the formal compensation order. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without regard to the receipt of the formal compensation order."

Following the execution of the settlement agreement, neither the deputy commissioner nor his designee filed and mailed a formal compensation order.

On July 2, 1977, plaintiff commenced the present action in the Southern District of New York against the shipowner (Compass Shipping Co. Ltd.) and bareboat charterer (Djakarta Lloyd, P.N.) after an earlier suit had on June 2, 1976, mistakenly been instituted in the same court against the shipowner only and was apparently dropped. On April 21, 1978, the defendants moved for summary judgment based on plaintiff's failure to sue within six months of the settlement agreement as required by 33 U.S.C. § 933(b).

On September 12, 1978, Judge Carter filed an opinion, 456 F. Supp. 1014, holding that the settlement agreement amounted to an order within the meaning of § 33(b), requiring plaintiff to sue within six months unless he could show that that section should not be applied because of a conflict of interest between himself and his employer with respect to the institution of a personal injury suit against the shipowner or charterer, see *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956). Plaintiff was given 60 days within which, through use of discovery proceedings, to demon-

strate a conflict. When plaintiff failed to adduce evidence other than his attorney's affidavit to the effect that the employer had a policy of not prosecuting actions based on a § 33(b) assignment, the district court granted summary judgment, dismissing the complaint on the ground that plaintiff's rights against the defendant had been assigned to his employer pursuant to § 33(b) by reason of his failure to bring suit against them within six months after the settlement. From this judgment plaintiff appeals.

DISCUSSION

Appellant's threshold contention that defendants have no "standing" to raise the assignment defense because the shipowner's liability is unaffected by the assignment need not take us long. The argument is clearly without merit.

The defense raised by the defendants, that plaintiff is not the real party in interest, may always be invoked pursuant to F.R. Civ.P. 17(a), which provides that every action shall be prosecuted in the name of the real party in interest. Without this defense a defendant might be exposed to multiple suits based on the same claim. *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 470 & n.34 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969). A person, such as the employer here, to whom a claim has been assigned under § 33(b), is the real party in interest. *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530 (1933); *Moore v. Hechinger*, 127 F.2d 746 (D.C. Cir. 1942). Assuming the assignment here to be valid, the right to sue is exclusively that of the employer, which has not joined in the action or ratified its commencement even though it has had a reasonable

time to do so. The defense of assignment therefore is properly asserted as a procedural matter by the defendants.

Turning to the merits, the first question is whether the settlement agreement amounted legally to an "award in a compensation order" of the deputy commissioner or [Workmen's Compensation] Board within the meaning of § 33(b), triggering its assignment provisions. Plaintiff first argues that the award must be approved by the deputy commissioner and that a claims examiner will not suffice. We disagree.

Section 39(a) of the Act, 33 U.S.C. § 939(a), empowers the Secretary of Labor to make such rules and regulations "as may be necessary in the administration of this chapter." Almost identical language has been construed by the Supreme Court to permit an official to delegate duties, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947), and it is generally accepted in this day and age that a governmental administrator vested with such authority may delegate unless expressly forbidden by statute or by the inconsistency of such a delegation with the purposes of the statute. *E.E.O.C. v. Raymond Metal Products Co.*, 530 F.2d 590, 594 (4th Cir. 1976), 1 K. Davis, Administrative Law Treatise, § 3.18 (2d ed. 1978). Without the power to delegate the director or deputy director of large divisions of a government department would be hampered in the performance of his multifarious duties.

No sound reason is advanced by plaintiff here in favor of a narrow construction of the Act that would forbid such delegation. A claims examiner, well versed in the factors to be considered in protecting a claimant's right to adequate compensation, is in just as

advantageous a position as a deputy director to determine whether a settlement is in the best interest of an injured employee entitled to compensation. Nothing in the history of the statute indicates that Congress' purpose was to insure the exercise of the personal discretion of the deputy commissioner as distinguished from that of a duly qualified designee. We therefore hold that under the regulations in effect at the relevant time, an agreement settling an injured employee's claim to workmen's compensation, signed after an informal conference with a claims examiner, by whom it was approved, constitutes an "award" within the meaning of § 33(b).[1]

In support of his contrary interpretation appellant relies on earlier decisions holding that, although the formality of an order is not required, *Toomey v. Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941), a settlement agreement signed by a claims examiner is insufficient to satisfy the requirement of § 33(b) and that it does not become an award until signed by a deputy commissioner. *Grasso v. Lorentzen*, 149 F.2d 127, 129 (2d Cir.), *cert. denied*, 326 U.S. 743 (1945); *Sessa v. Weeks Stevedoring Co.*, 56 F. Supp. 50 (S.D.N.Y. 1943). These decisions, however, represented an effort to relieve claimants from the harshness of the Act as it existed prior to the 1959 amendments which govern the present case.

---

1 The regulations were revised effective September 9, 1977, subsequent to the relevant events in this lawsuit. As now written, 20 C.F.R. § 702.312 provides that while an informal conference may be called by "the deputy commissioner or his designee," a compensation order following an agreement may be issued only by a person designated by the Director of OWCP. Previously, such an order could be filed by anyone empowered to call the informal conference. We need not determine whether our result would differ had the settlement taken place after the new regulations took effect.

Prior to 1959, the right to sue third parties was assigned to the employer as soon as a settlement was reached. This forced an injured employee to elect at once between immediate compensation and delays and uncertainties of litigation at a time when he had cash flow problems. Many courts therefore invoked every available technicality to avoid finding an assignment.

Congress in 1959 amended § 33(b) to permit the employee to receive a statutory compensation award which would not operate as an assignment unless he failed to sue within six months. S. Rep. No. 428, 86th Cong., 1st Sess., reprinted in 1959 U.S. Cong., & Admin. News 2134-35. With the elimination of the harshness that prompted *Grasso* and *Sessa*, the Act as it stood at the time of the events here should be construed "from the realities of the situation rather than by the labels employed," *Sabol v. Merritt Chapman & Scott Corp.*, 241 F.2d 765, 767 (2d Cir. 1957). We see no reason to prevent the OWCP from allowing a claims examiner to approve settlements.

Appellant's next contention is that since neither the deputy commissioner nor the claims examiner filed a formal compensation order, there was no assignment under § 33(b). We disagree. The purpose of the provision for filing of an order was to insure that the claimant-employee knew that he was foregoing his right to sue by acceptance of the compensation agreement. H. Rep. No. 1945, 75th Cong., 3rd Sess. at 9 (1938). Where, as here, the employee, upon signing the compensation agreement with the assistance and co-signature of his counsel, is fully aware of his rights, including his right to sue within six months, the failure of an administrator to comply with the formality imposed by departmental regulations (20 C.F.R.

§ 702.315, *supra*) of filing the formal order can have no significance as far as the substantive rights of the parties are concerned. The employer's obligation to start paying compensation to the employee commences immediately upon signing of the agreement. To delay the operation of § 33(b) until the filing of an order would be to exalt form over substance. Accordingly, we conclude that under the regulations as they existed prior to September 9, 1977, which are the regulations applicable to this case, § 33(b) applied and operated to assign to appellant's employer his right to sue the shipowner.[2]

Notwithstanding the applicability of § 33(b), appellant, relying principally upon *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956), contends that since the employer does not propose to sue the defendants, the assignment should be invalidated as a matter of public policy and appellant should have been permitted to bring suit more than six months after the compensation award. We disagree.

It is true that if the employer brought suit against the shipowner and recovered it would, after deduction from the proceeds of any compensation payments made to the employee plus attorney's fees in effectuating the recovery, be obligated to pay 80% of the balance to appellant and permitted to retain 20% for itself. To

---

2 Effective September 9, 1977, 20 C.F.R. § 702.315 provides that a formal compensation order need not be filed unless either the employer or the employee requests it. It may be argued that under this new provision, the filing of an order has become more than a formality—the employer who fails to request an order may be waiving his right to assignment of the claim. Since the new regulations were not in effect at the time of the settlement of this claim or within six months thereafter (when the assignment became effective), we need not determine whether the change would affect the result in a case such as this.

this extent the employee has an interest conflicting with that of the employer, which often chooses not to antagonize its customer, the shipowner, by bringing a suit against it. See *Valentino v. Rickners Rhederei, G.M.B.H.*, 552 F.2d 446 (2d Cir. 1977). The simple answer is that appellant was afforded six months to bring his own suit against the shipowner, free and clear of any control by the employer, but chose not to do so. We do not view the six months time bar as unreasonable or harsh under the circumstances.

Czaplicki is clearly distinguishable and, as we pointed out in *Sabol v. Merritt Chapman & Scott Corp.*, 241 F.2d 765, 768 (2d Cir. 1957), "was carefully limited by the court to the peculiar situation there presented." It was decided prior to the 1959 amendments of § 33(b). At that time the employee, upon entering into a settlement agreement with his employer and accepting compensation, immediately lost any right to sue the shipowner, since that right, by assignment, became exclusively the right of the employer. However, in *Czaplicki* the employer's insurer, which by subrogation acquired the employer's exclusive assigned right to sue, was also the shipowner's insurer. Thus, if the insurer brought suit it would as a practical matter not only be suing itself but also be under an obligation to turn over 80% of any recovery in excess of compensation payments and attorney's fees to the employee. In the absence of any right at all on the part of the employee to sue the shipowner, the Supreme Court understandably held that the conflict of interest was sufficient to nullify the assignment, noting that "Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced," 351 U.S. at 530. Even in the

absence of a common insurer, the prospect of a conflict between the interest of the employee and that of his employer with respect to the institution of suit against the shipowner arose as a result of the Supreme Court's decision five months earlier in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), that a shipowner held liable for injuries to a longshoreman could recover over against the employer-stevedore for breach of the latter's obligation to perform its duties safely. As a result, an employer suing the shipowner upon the employee's assigned claim might be met with the defense that the employer was ultimately liable. Thus the employer, unlike its employee, had no interest in pressing the assigned claim against the shipowner after payment of compensation and the employee, by virtue of the assignment, had lost any right to do so.

This state of affairs was changed by the 1959 amendments to § 33(b), which gave the employee six months within which to sue. It was further alleviated by Congress' amendment in 1972 of § 5(b) of the Act, 33 U.S.C. § 905(b), which eliminated an employer's liability to a shipowner under the principles of *Ryan Stevedoring Co.* Moreover, had Congress desired when it amended the Act to give both the employee and the employer the right concurrently to sue the shipowner, nothing prevented it from doing so. Instead it chose to give the employee six months within which to bring such a suit and if the employee failed to do so within that period to assign the right exclusively to the employer. We are bound by that enactment. Although *Czaplicki* was applied in a few cases postdating the 1959 amendments to the Act, see, e.g., *McClendon v. Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965); *Poto-*

mac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965), we prefer, in view of the later changes in the Act, to treat *Czaplicki* as limited to its unique facts, which are not presented here.

The judgment of the district court is affirmed.

No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1980.

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

against

OVE SKOU, R. A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOINT APPENDIX.

MORRIS CIZNER
Counsel for Petitioners
160 Broadway
New York, N. Y. 10038
(212) 227-1350

(Names of Attorneys continued on inside of cover.)

PETITION FOR CERTIORARI FILED JUNE 16, 1980
CERTIORARI GRANTED OCTOBER 6, 1980.

WALKER & CORSA
Attorneys for Respondents, Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N., and Arya National Shipping Line, Ltd.
25 Broad Street
New York, N. Y. 10004
(212) 344-4700

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Respondent, Ove Skou, R.A.
One State Street Plaza
New York, N. Y. 10004
(212) 344-6800

TABLE OF CONTENTS.

Page

Statement regarding all Lower Court Opinions 1a

JOINT APPENDIX IN PEREZ VS. ARYA NATIONAL SHIPPING LINE, LTD.:

Docket Entries 5a

Opinion of Hon. Morris E. Lasker . 7a

JOINT APPENDIX IN RODRIGUEZ VS. COMPASS SHIPPING CO. LTD.:

Docket Entries 11a

Complaint 14a

Answer 23a

Defendants' Notice of Motion . . 30a

Affidavit of Joseph T. Stearns in Support 32a

Exhibit C, Annexed to Affidavit . 41a

Affidavit of Edward D. Lory in Opposition 43a

Reply Affidavit of J.T. Stearns . 50a

Page

Opinion of Hon. Robert L. Carter . 61a

Affidavit of Edward D. Lory in Opposition 62a

Affidavit of Joseph T. Stearns Re Settlement Proposed Order . . 67a

Order of Dismissal dated December 6, 1978 . . . . . 73a

Plaintiff's Notice of Motion to Vacate Dismissal 76a

Memo Endorsement dated Jan. 18, 1979, Denying Motion . . . 80a

Affidavit of Joseph T. Stearns in Opposition 81a

Notice of Appeal 84a

Stipulation as to Exhibits . . . 85a

Exhibit A, Annexed to Foregoing Stipulation 86a

Exhibit B, Attached to Foregoing Stipulation 87a

Page

JOINT APPENDIX IN BARULEC VS. OVE SKOU, R.A.:

Docket Entries 91a

Notice of Motion for Leave to Serve and File an Amended Answer and for Summary Judgment . . . 93a

Statement Pursuant to Rule 9(g) . 96a

Affidavit of Richard K. Matanle II . 98a

Exhibits Annexed to Affidavit of Richard K. Matanle II:

A. Amended Answer to Complaint 102a

B. Employer's First Record of Accident or Occupational Illness 109a

C. Payment of Compensation Without Award . . . 113a

D. Compensation Payment Stopped or Suspended . . 115a

E. Letter dated March 25, 1975 117a

Page

F. Letter, dated August 8, 1975 . . . . . 118a

G. Letter, dated December 22, 1975 . . . . . 119a

H. Memorandum of Informal Conference 120a

I. Compensation Payment Stopped or Suspended . . 125a

Answering Affidavit of Martin Lassoff in Opposition to Motion 128a

Reply Affidavit of Richard K. Matanle II in Support of Motion 131a

Exhibits Annexed to Reply Affidavit of Richard K. Matanle II:

A. Letter, dated November 21, 1978 . . . . . 137a

Page

Order of Dismissal 138a

Opinion of Unites States District Court 141a

Notice of Motion Renewing Defendant's Motion for Summary Judgment 142a

Affidavit of Richard K. Matanle II in Support of Motion . . . 144a

Affidavit of Morris Cizner in Opposition to Motion . . . 149a

Memorandum Opinion of Hon. Morris E. Lasker, U.S.D.J., August 8, 1979 . . . . . 162a

Opinion of Hon. Morris E. Lasker . 164a

PEREZ APPEAL.

Opinion of Hon. Morris E. Lasker, U.S.D.J., dated April 17, 1979, is printed in the Supplemental Appendix to Petition as Appendix F at pages 1f to 14f.

RODRIGUEZ APPEAL.

Opinion of Hon. Robert K. Carter, U.S.D.J., dated September 12, 1978, is printed in the Supplemental Appendix to Petition as Appendix E at pages 1e to 39e.

BARULEC APPEAL.

Opinion of Hon. Morris E. Lasker, U.S.D.J., dated May 31, 1979, is printed in the Supplemental Appendix to Petition as Appendix G at pages 1g to 17g.

CIRCUIT COURT OPINIONS.

The Decision of the United States Court of Appeals, Fourth Circuit, is printed in the Petition for Writ of Certiorari as Appendix A at pages 1a to 12a.

The Decision of the United States Court of Appeals, Second Circuit, is printed in the Petition for Writ of Certiorari as Appendix B at pages 1b to 14b.

79-7632

United States Court of Appeals

FOR THE SECOND CIRCUIT

LUIS PEREZ,

Plaintiff-Appellant,

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant
160 Broadway
New York, N.Y. 10038
(212) 227-1350

WALKER & CORSA,
40 Wall Street
New York, N.Y. 10005
(212) 344-4700

DOCKET ENTRIES (Pages 5a to 6a.)

Date	NR.	Proceedings
7-16-76	2	Filed Summons and marshals ret. Served: Arya Nat'l Shipping Line Ltd. % Norton Lilly & Co., Inc. on 7-12-76.
12-2-76	3	Filed defts interrogs.
12-2-76	4	Filed ANSWER (W&C)
12-2-76	5	Filed notice of deposition of pltff on 1-13-77 at 2PM
4-29-77	6	Filed answers to interrogs..
5-2-77	7	Filed notice of deposition of J. Costello on 5-27-77 at 2:30PM. Issued summons.
5-4-77	8	Filed deft supplemental interrogs.
7-7-77	9	Filed Pltffs. Supplemental Answers to interrogs.
7-12-77	10	Filed Pre Trial Order.....So Ordered Lasker J. (Consented to)
11-14-78	11	Fld dfts. Memo. of Law.
11-14-78	12	Fld defts. Affdvt. by Joseph T. Stearns in support of a motion for order pur to 12 & 56 FRCP.
11-27-78	13	Fld affdvt. by Martin Lassoff in opposition to dfts. motion,
11-29-78	14	Fld pltffs. Brief in opposition.

PREVIOUS PAGE WAS BLANK

Date	NR.	Proceedings
12-11-78	15	Fld reply Memo. of dft. in support of the motion to dismiss by virtue of section 933(b) of the Longshoremen's & Harbor Workers' compensation act.
4-13-79	16	Filed Dfts. Notice of New Location for attys.
4-17-79	17	Filed Opinion #48466. dfts. motion to dismiss action denied, without prejudice to renewal after 40 days. So Ordered Lasker J. (mn)
7-3-79	18	Filed Dfts. Notice of Motion for an order pur to rule 56FRCP for summary judgment dismissing pltffs. complaint. Ret. 7/13/79. wc
8-13-79	-	Filed Memo Endorsed on deft's motion for summary judgment. Motion for summary judgment dismissing this action is granted... Lasker, J. m/n
8-15-79	19	Filed Judgment. ORDERED, ADJUDGED, and DECREED; That the complaint be and it is hereby dismissed... Clerk, J.
9-4-79	20	Filed Pltffs Notice of appeal from endorsement dtd. 8-10-79 & opinion dtd. 4-17-79. (mailed notice to walker & Corsa , 25 Broad St NYC 10004)
9-11-79	21	Fld Certification of Record to the USCA.

OPINION OF Hon. Morris E. Lasker.

(Printed in the Supplemental Appendix
to Petition as Appendix F at
pages 1f to 14f.)

79-7132

United States Court of Appeals

FOR THE SECOND CIRCUIT

FREDERICO RODRIGUEZ,

Plaintiff-Appellant,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff-Appellant
160 Broadway
New York, N.Y. 10038
(212) 227-1350

WALKER & CORSA
Attorneys for Defendants-Appellees
25 Broad Street
New York, N.Y. 10004
(212) 344-4700

PREVIOUS PAGE WAS BLANK

DOCKET ENTRIES (Pages 11a to 13a.)

RODRIGUEZ -v- COMPASS SHIPPING CO.
JUDGE CARTER 77 civ 3378

Date	NR.	Proceedings
07-12-77	1.	Filed Complt. & Iss. Summs.
08-02-77	2.	Filed Summs with marshal's return: Djakarta Lloyd P.N. J. Bridgeweld 07-19-77
08-05-77	3.	Filed Deft's answer. wc
02-17-78	---	
02-23-78	4.	Filed Pre-trial Schedule Order... Carter, J.
04-21-78	5.	Filed deft's Motion for an order for summary judgment, etc...Ret: 5-5-78-10-am.
04-21-78	6.	Filed deft's memo of law in support of motion for summary judgment.
04-24-78	7.	Filed Pltffs. Motion for an order modifying the prel. inj. dtd 4-14-78. Ret: 5-5-78 9:30 am.
05-10-78	8.	Filed defts' Pre-trial memorandum.
05-19-78	9.	Filed Pltff's affdvt in opposition to defts' motion for summary judgment.
05-23-78	10.	Filed Defts' reply affdvt in further support of their motion to dismiss.

PREVIOUS PAGE WAS BLANK

DATE	NR.	Proceedings
06-02-78	11.	Filed Pre-trial Memo of defts.
09-13-78	12.	Filed Opinion # 47598= Conclusion: The motion for summary judgment is denied. The Motion to dismiss based on an earlier order of dismissal of Judge Bonsal is also denied. Decision on the motion to dismiss based on 33 USC 933 is reserved, pending discovery to be completed within 60 days of this opinion. It is so ordered...Carter, J. m/n
11-27-78	13.	Filed Pltff's affdvt.
11-29-78	14.	Filed Pltff's brief in opposition to deft's motion.
12-07-78	15.	Filed Deft's Affdvt in connection with the settling of a proposed order etc...
12-08-78	16.	Filed Order that the motion to dismiss the case for failure to commence suit with 6 months of an award of compensation is granted and the complt. is dismissed with prej. and with costs to defts...Carter, J. dtd 12-6-78.
12-18-78	17	Filed Pltff's Notice of Motion for an order vacating the order of dismissal dtd 12-8-78. Ret: no date.
12-18-78	18.	Filed Memorandum in support of pltff's motion for reargument.

Date	NR.	Proceedings
01-15-79	19.	Filed deft's memorandum in opposition to pltff's motion for reargument.
01-18-79		Filed Memo-end on Notice of Motion dtd 12-18-78 = Motion to vacate judgment and for a rehearing denied. So Ordered. Carter, J. dtd 1-18-79 m/n
02-15-79	20.	Filed Notice of Appeal to the U.S.C.A. by Frederico Rodriguez from the order of dismissal dtd 12-6-78 and order dtd 1-17-79 m/n to Walker & Corsa.

COMPLAINT (Pages 14a to 22a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING).

Plaintiff demands a trial by jury.

Plaintiff, complaining of the defendants above-named, by ZIMMERMAN & ZIMMERMAN, his attorneys, respectfully alleges:

I. Upon information and belief, the defendant COMPASS SHIPPING CO., LTD. is a foreign corporation.

II. Upon information and belief, the defendant DJAKARTA LLOYD P.N. is a foreign corporation.

III. Upon information and belief, the defendant COMPASS SHIPPING CO., LTD. does not have its principal place of business in the State of New York.

IV. Upon information and belief, the defendant DJAKARTA LLOYD P.N. does not have its principal place of business in the State of New York.

V. Plaintiff is a citizen and resident of the State of New York.

VI. That the matter in controversy, exclusive of interest and costs, exceeds the sum of TEN THOUSAND ($10,000.00) DOLLARS.

VII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant COMPASS SHIPPING CO., LTD. was the owner of the vessel, the S.S. SOUTH BREEZE.

VIII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant COMPASS SHIPPING CO., LTD. manned said vessel and their Masters, Officers and crew were on board said vessel and in possession of same.

IX. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, COMPASS SHIPPING CO., LTD, managed, operated, maintained and controlled said vessel.

X. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. was the time charterer of the vessel, the S.S. SOUTH BREEZE.

XI. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. was the bareboat charterer of the vessel, the S.S. SOUTH BREEZE.

XII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. manned said vessel and their Master, Officers and Crew were on board said vessel and in possession of same.

XIII. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD P.N. managed, operated, maintained and controlled said vessel.

XIV. Upon information and belief that at all the times herein after mentioned, the said S.S. SOUTH BREEZE was docked at the 60th Street Pier, Brooklyn, New York and stevedoring work was being performed thereon.

XV. Upon information and belief that at all the times herein mentioned, the said stevedoring work on board said vessel was being performed by INTERNATIONAL TERMINAL OPERATING CO., INC., pursuant to agreement with the defendant COMPASS SHIPPING CO., LTD. or its agents.

XVI. Upon information and belief that at all the times herein mentioned, the said stevedoring work on board said vessel was being performed by INTERNATIONAL TERMINAL OPERATING CO., INC., pursuant to agreement with the defendant DJAKARTA LLOYD P.N. or its agents.

XVII. Upon information and belief that at all the times herein mentioned, said

stevedoring work on board said vessel was being performed under the general supervision and direction of the defendant, COMPASS SHIPPING CO., LTD., its agents, employees, the Master, Officers and Crew of said vessel.

XVIII. Upon information and belief that at all the times herein mentioned, said stevedoring work on board said vessel was being performed under the general supervision and direction of the defendant, DJAKARTA LLOYD P.N., its agents, employees, the Master, Officers and Crew of said vessel.

XIX. That at all the times herein mentioned, plaintiff was employed as a longshoreman by said INTERNATIONAL TERMINAL OPERATING CO., INC., and in the course of the performance of his duties was lawfully on said vessel in Hatch No. 2 thereof.

XX. Upon information and belief that at all the times herein mentioned and

prior thereto, the defendant, COMPASS SHIPPING CO., LTD. maintained said Hatch No. 2 of said vessel herein mentioned.

XXI. Upon information and belief that at all the times herein mentioned and prior thereto, the defendant, DJAKARTA LLOYD, P.N. maintained said Hatch No. 2 of said vessel herein mentioned.

XXII Upon information and belief that at all the times herein mentioned and prior thereto, the said Hatch No. 2 of said vessel was a part thereof, and was maintained, supplied and provided by defendants to longshoremen for use in connection with the performance of their stevedoring work on board said vessel.

XXIII. That on or about the 4th day of September, 1973 while plaintiff was lawfully on board said vessel when he was caused to slip and fall and to sustain severe personal injuries.

XXIV. That said accident was caused solely by reason of the carelessness and negligence on the part of the defendant, its agents, employees, the master, officers and crew of said vessel in that they failed to supply plaintiff with a safe place to work; in that they failed to supply suitable, safe, proper and adequate walking and working surfaces; in that they failed to provide sufficient illumination; in that they failed to provide ladders that were safe for use; in that they failed to warn plaintiff thereof; in that they maintained said hatch with hidden traps therein and thereat; in that they breached Strict Liability without Fault; in that they failed to remedy or repair said conditions complained of; in that they failed to avoid said accident although it was foreseeable; in that they permitted said vessel to be, become and remain unsafe and unseaworthy and so maintained same;

in that they breached Federal Safety and Health Regulations; in that they failed to avoid said accident although they had reasonable opportunity to do so and in that they were careless and negligent in other respects.

XXV. That as a result thereof, the plaintiff sustained certain severe personal injuries both internal and external, to divers parts of his arms, head, legs and body and he was made sick, sore, lame and disabled and suffered a severe shock to his nervous system and plaintiff believes that some of the injuries he sustained may remain permanent.

XXVII. That plaintiff was compelled to expend divers sums of money for medical aid and attention in the endeavor to cure himself of the injuries he sustained and may in the future be compelled to expend further sums of money for such purpose

and plaintiff was, and may in the future, be unable to pursue his usual vocation, to his damage.

XXVIII. That by reason of the premises, the plaintiff has sustained damage in the sum of TWO HUNDRED THOUSAND ($200,000.00) DOLLARS.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of TWO HUNDRED THOUSAND ($200,000.00) DOLLARS, besides the costs and disbursements of this action.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
Office & P.O. Address
160 Broadway
New York, New York 10038

ANSWER (Pages 23a to 29a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendants, Compass Shipping Co., Ltd. and P.T. Djakarta Lloyd, sued herein as Djakarta Lloyd P.N., answering plaintiff's complaint, states on information and belief as follows:

1. Admit the allegations contained in paragraphs I, II, III, IV, VII, XI and XIV of the complaint.

2. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs V, XVI and XIX of the complaint.

3. Admit that at the time mentioned in the complaint defendant P.T. Djkarta Lloyd manned M/S SOUTH BREEZE and that her master, officers and crew were aboard the vessel from time to time and in possession of same, but not those parts or portions thereof turned over to longshoremen, steve-

dores or other independent contractors, but except as so specifically admitted herein, deny each and every other allegation contained in paragraph XII of the complaint.

4. Admit that at the time mentioned in the complaint defendant, P.T. Djkarta Lloyd managed, operated, maintained and controlled M/S SOUTH BREEZE, but not those parts or portions thereof, including the No. 2 hatch, turned over to longshoremen, stevedores and other independent contractors for use in connection with the performance of work aboard the vessel, but except as so specifically admitted herein, deny each and every other allegation contained in paragraphs XIII, XXI and XXII of the complaint.

5. Deny each and every allegation contained in paragraphs VI, VIII, IX, X, XV, XVII, XVIII, XX, XXIII, XXIV, XXV, XXVII and XXVIII of the complaint.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIRST AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELEF AS FOLLOWS:

6. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

7. If plaintiff was injured in the manner and for the reason alleged by him, his injuries were caused and/or brought about in whole or in part by his own negligence or by the negligence of others, including his co-employees, for whose negligence defendant is not liable.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A SECOND AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

8. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

9. Upon information and belief payment of compensation pursuant to an award was made to plaintiff under the Longshoremens' & Harbor Worker's Compensation Act more than six months prior to institution of this suit.

10. By virtue of 33 USCA §933(b) "all right" of plaintiff against defendant was assigned to plaintiff's employer or its insurer six months after payment of compensation pursuant to an award and plaintiff is therefore without standing to maintain this action.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A THIRD AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

11. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

12. Upon information and belief, as a result of the injuries alleged in this suit plaintiff received compensation benefits under the Longshoremens' and Harbor Worker's Compensation Act from his employer or his employer's insurer and plaintiff is, therefore, not the real party in interest in respect to the portion of the total claim of damages which represents compensation already paid or to be paid to him under any provision of the said Act to which his employer or his employer's

insurer has thereby became subrogated.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FOURTH AFFIRMATIVE DEFENSE TO ALL CAUSES OF ACTION, DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF AS FOLLOWS:

13. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with the same force and effect as if herein repeated and set forth at length.

14. Plaintiff's cause of action is time barred and barred by the Maritime Doctrine of Laches and defendants have been prejudiced thereby.

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIFTH AFFIRMATIVE DEFENSE ON BEHALF OF DEFENDANT COMPASS SHIPPING CO., LTD., SAID DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

15. Repeats and realleges each and every admission, denial and denial of knowledge or information hereinabove set forth, with

the same force and effect as if herein repeated and set forth at length.

16. Plaintiff brought suit in this honorable court to recover damages for the same alleged injury which is subject to this proceeding. This suit, 76 Civ. 2451 (DBB), as against this defendant was dismissed with prejudice on March 28, 1977 and the within action is not maintainable.

WHEREFORE, defendants demand judgment dismissing the complaint herein, together with costs and disbursements of this action.

Dated: New York, New York
August , 1977

WALKER & CORSA
Attorneys for Defendants

By _____
A Member of the Firm
25 Broad Street
New York, New York 10004

DEFENDANTS' NOTICE OF MOTION (Pages 30a to 31a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of JOSEPH T. STEARNS, duly sworn to the 21st day of April, 1978, the pleadings and all prior proceedings had herein, the undersigned will move this court before the Honorable Robert L. Carter, a judge of this court to whom this case is assigned for all purposes, at the United States Courthouse, Room 2903, on the 5th day of May, 1978, at 10 o'clock in the noon of that day or as soon thereafter as counsel can be heard for the following relief:

1. For an order pursuant to Rule 56 FRCP for summary judgment dismissing plaintiff's complaint;

2. For an order pursuant to Rule 12 FRCP and 33 U.S.C. §933(b) dismissing this case because not brought within six months of an award as required.

3. For such other and further relief as may be just in the premises.

Dated: New York, New York
April 21, 1978

Yours, etc.,

WALKER & CORSA
Attorneys for Defendants

By _____
A Member of the Firm
25 Broad Street
New York, New York 10004

TO: ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

AFFIDAVIT OF JOSEPH T. STEARNS IN SUPPORT
(Pages 32a to 40a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendants. I make this affidavit in support of defendants' motion for a dismissal of this complaint on grounds that plaintiff's cause of action was assigned by operation of law prior to institution of suit and for summary judgment on grounds that plaintiff's claim of liability is deficient as a matter of law.

2. This is a longshoreman's "new act" personal injury case. Plaintiff claims to have been injured on September 4, 1973 while working aboard S.S. SOUTH

BREEZE at Pier 60, Brooklyn, New York as an employee of the contract stevedore, International Terminal Operating Co., Inc. At that time the vessel was owned by defendant, Compass Shipping Company Ltd. and was under bareboat charter to defendant D. Jakarta Lloyd P.N., which employed the officers and crew. Plaintiff has testified by deposition that he was injured at approximately 4:45 p.m. while leaving the vessel's No. 2 hatch by means of a so-called "escape hatch" ladder located at the after end of the No. 2 hatch, and which was affixed to the common bulkhead between hatches 2 and 3. According to plaintiff's testimony (we annex a complete copy of the transcript of plaintiff's deposition as Exhibit "A" to this affidavit) at his pre-trial deposition plaintiff climbed up the straight steel ladder affixed to the common bulkhead between these two

hatches (transcript, p. 13) to the very top of the ladder which led to the masthouse or small enclosure ("little house", p.14) providing a platform for the winches between these two hatches. According to plaintiff's deposition testimony as he reached the top of the ladder he reached out with what he thought was his right hand to secure a handhold affixed, apparently to the masthouse bulkhead (see, pp. 16-17). He then put his right foot firmly on the deck inside the masthouse and swung his left leg out of the opening at the head of the ladder. For reasons which plaintiff could not adequately explain he somehow proceeded to place his left foot in the opening of the escape hatch latter leading to hatch No. 3 which was affixed, of course, to the other side of the common bulkhead, both ladders leading to separate but apparently closely together circular hatchways (pp. 17-28). At his deposition plaintiff could

add absolutely nothing to this description of his accident by way of explanation of why this "accident" had occurred and indeed given an opportunity in his own words (p. 28) to account for his injury in terms other than his exclusive negligence plaintiff stated that he could not do so. Careful reading of this transcript discloses absolutely no basis for plaintiff's claim of negligence of the shipowner or bareboat charterer as causing or contributing in any way to the occurrence of his alleged injuries. To the degree that plaintiff suggested that the accident was the result of the "somewhat dark" lighting conditions in the masthouse, plaintiff also said: that he could see (p. 25), apparently, the opening before he stepped into it; that the arrangement of the openings in the masthouse was familiar to him because the escape hatch openings are similarly arranged on all other ships (p. 19) and

because he had used the same ladder 3 times before that day (p. 30); and, the masthouse door was open, a distance of some foot and a half or two from where his accident occurred (p. 43).

3. The matter in suit was first brought to this court by summons and complaint filed June 2, 1976. Plaintiff's original complaint named the owner of the vessel, Compass Shipping Company Ltd. as the sole defendant. This case was assigned to Judge Dudley B. Bonsal and was docketed with this court as 76 Civ. 2451 (DBB). The pre-trial conferences before Judge Bonsal in that case it was disclosed to the attorneys for plaintiff that although the shipowner had been correctly identified the claim of liability for negligence for acts of the ship's officers and crew would not lie against the owner, since the vessel was under bareboat charter to

D. Jakarta Lloyd P.N. which under terms of the charter was the employer. On the basis of our assumption that plaintiff's complaint was directed towards assertion of personal fault of the shipowner or other persons responsible for the acts of the crew, we informed the court and opposing counsel that, in result, an improper party defendant had been named. The attorney for plaintiff agreed and signed an order of discontinuance subject to confirmation of our representation to plaintiff's attorneys that, indeed, the bareboat charterer not the vessel owner was the employer of the crew at the time of the event in suit. This order provided attorney for plaintiff opportunity within 60 days to apply to the court for relief from the order of discontinuance. Plaintiff's attorney made no such application, but after initially attempting to persuade Judge Bonsal to permit an amendment to

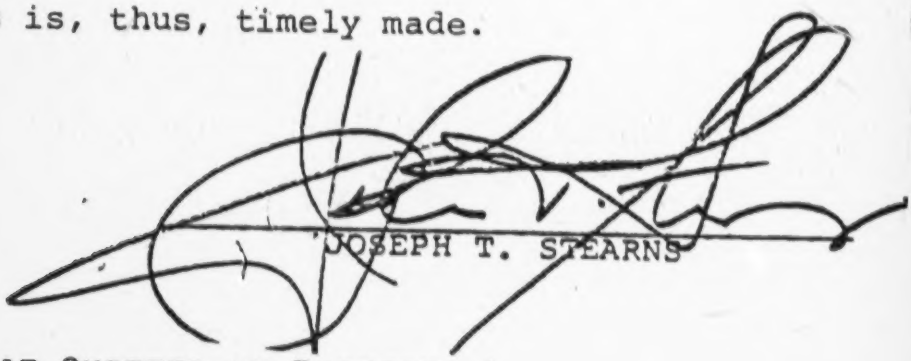
the complaint to add the bareboat charterer as a co-defendant, this suit was instituted and, despite the order of dismissal as against Compass Shipping Company Ltd., vessel owner, this party was again named as a defendant in this subsequent action.

4. This suit was filed July 12, 1977. Plaintiff dismissed case against the shipowner only was begun June 2, 1976. As a result of the claim of injury in suit plaintiff received Workmen's Compensation under the Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.* He was paid $1,090.70 temporary total disability and was, in addition, awarded $2,519,51 for an alleged 5 1/2% permanent partial loss of use of the left leg. Total compensation payable by the employer, exclusive of medical expenses was, $3,610.21 for an "injury" described by the treating doctor as a "contusion

and puncture" wound. Plaintiff's award for scheduled loss of use was issued by order of the compensation board November 4, 1974, a copy of which we annex as Exhibit "C". This suit, and its predecessor, were begun more than six months from the award. This lapse of time without institution of suit causes an assignment of plaintiff's cause of action to his employer, International Terminal Operating Co., Inc. Plaintiff is without claim against the shipowner or charterer by provision of 33 U.S.C. §933(b), as alleged by defendant as its second affirmative defense.

5. By provision of this court's order of February 22, 1978 discovery must be completed by April 21, 1978 at which time this case is scheduled to be added to the court's ready calendar. It is similarly provided that all motions for summary judgment or dismissal of the complaint be filed not later than April 21, 1978.

Thereafter, by provision of the court's order numerous preliminary steps in preparation for trial are required. This motion to dismiss is, thus, timely made.



JOSEPH T. STEARNS

(JURAT OMITTED IN PRINTING.)

EXHIBIT C, ANNEXED TO AFFIDAVIT
(Pages 41a to 42a.)

U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Longshore & Harbor Workers' Compensation Act
1515 Broadway
New York, New York 10036

OWCP # 2-29100

We, the undersigned, having an informal conference, and having received a copy of the signed agreement, in this case on 11/4/74, agree, by the issuance of a Compensation Order, to the following disposition:

(1) Temporary Total Disability Compensation: 9/5/73 to 10/22/73, inclusive 6-6/7 weeks at $159.06 per week, in the amount of $1040.70, less $477.18 previously paid, leaving a balance due of $613.52.

(2) Permanent Partial Disability Compensation: 5½% permanent partial disability of the left leg, 15.84 weeks at $159.06 per week, in the amount of $2519.51.

(3) Total Combined Compensation Payable: $3610.21, less $477.18 previously paid, and

less $510.00 approved fee (to include expenses,) leaving a balance due of $2.623.03.

The employer-carrier shall make payment promptly following the conference, without regard to the receipt of the formal compensation order, in accordance with Section 702.315 (a) of the Regulations.

Federico Rodriguez
Claimant

Claimant's representative

Employer's or Carrier's Rep.

Claims Examiner

Temp. NY Conf.-2

AFFIDAVIT OF EDWARD D. LORY IN OPPOSITION
(Pages 43a to 49a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK, COUNTY OF NEW YORK:

EDWARD D. LORY, as and for his Affirmation under penalty of perjury, states as follows:

Affiant is an associate attorney in the law firm of ZIMMERMAN & ZIMMERMAN, the attorneys for the plaintiff herein, who, upon plaintiff's file in the within action, makes this Affirmation in Opposition to defendants' motion for summary judgment pursuant to Rule 56 FRCP and in opposition to defendants' application for an order of dismissal pursuant to Rule 12 FRCP and 33 U.S.C. 933(b).

POINT I

Defendants' motion for summary judgment pursuant to Rule 56 FRCP must be denied for the reason that questions of fact remain at issue for determination by a jury.

At the outset it must be recalled that the Congress, with its Amendment to 33 U.S.C. 905(b) (Longshoremen and Harbor Workers' Compensation Act) stated that despite the Congressional elimination of the longshoreman's claim of unseaworthiness, that the shipowner could not assert assumption of risk as a defense.

Defendants' factual recitation recites a premise predicated upon assumption of risk. However, said recitation omits plaintiff's testimony on page 34, lines 8 and 9, that it was "very dark". In addition, defendants, in their moving papers, suggest that all cargo ships have a common arrangement plan with the manhole access to escape hatch ladders for adjacent hatches within one foot of each other. However, assuming defendants' factual recitation arguendo although not here agreed to, and adding the issue as to whether there was or was not sufficient

illumination in the interior of the common deck house between Hatches No. 1 and 2, genuine issues of fact remain for jury determination, namely, whether defendants' vessel with the manhole arrangement described constituted a reasonably safe arrangement for ingress and/or egress into and/or out of the hatch. The foregoing, in addition to the issue of illumination, appeared to be sufficient grounds to deny defendants' motion for summary judgment.

POINT II

With respect to Judge Bonsal's order of dismissal it should be noted that said Order was "without prejudice" so that plaintiff remained at liberty to include defendant, COMPASS SHIPPING COMPANY LTD. as the registered owner of the vessel as a party defendant in plaintiff's action against defendant, D. JAKARTA LLOYD P.N. who is alleged to have had the vessel

under bareboat charter in September, 1973.

POINT III

Pursuant to the cases of Grasso v. Lorentzen, 56 F.Sup. 51 (SDNY 1944) Aff'd 149 F.2d 127, and Potomac Electric Power Co. v. Whynn, 343 F.2d 295, the former decided by CCA 2d and the latter by CADC, defendants' allegation of assignment by operation of law is without merit.

Firstly, 22 U.S.C 933(b) was not designed to protect third parties such as the defendants herein from suit.

Secondly, Exhibit C alleged by the defendant herein to be a "formal order", is in fact not a formal order since it lacks the signature of a Deputy Commissioner. In the Grasso case, Supra, the Bar was told that to meet the requirements of Section 933(b) there must be an affirmative act or determination by the Deputy Commissioner. Exhibit C on its face recites that the parties in interest attended at an informal conference and agreed in writing to dispose of the claim

"without regard to the receipt of a formal compensation order", which order would have been signed by a Deputy Commissioner had it ever issued. That no formal order ever issued is apparent from its absence as an exhibit.

Thirdly, no mention is made that plaintiff's employer (assignee) brought any action to recoup both its lien plus one fifth (1/5) of any recovery obtained, with the balance of such recovery going to the plaintiff. As held in the Potomac Electic Power Co., case, Supra, the plaintiff-employee may bring suit against third party whenever it is evident, as it is here, that the employer-assignee does not intend to bring suit.

Section 933(b) and the Potomac Electric Power Co. case mentioned above, and the cases of Joyner v. F & B Enterprises (CADC 1971) 448 F.2d 1187 and Lindler v. District of Columbia (CADC 1974) 502

F.2d 500, support of Affiant's contentions that the employer's declination to sue a third party amounts to a waiver of the protection offered by statutory assignment and that the injured employee may bring suit against a third party whenever it is evident, as it is here, that the employer-assignee, for whatever reason, does not intend to bring suit.

Affiant submits further that solely plaintiff's employer can assert any rights under 933(b), namely, to bring the action itself and/or to substitute itself as plaintiff in any action brought by the injured employee subsequent to the expiration allowed an injured employee to bring the action himself and that the defendants herein are without privy, without legal standing and are and remain incompetent to raise any issues pursuant to the provisions of 933(b).

WHEREFORE, upon each and all the foregoing, Affiant submits that genuine issues of fact remaining, that defendants' motion for summary judgment pursuant to Rule 56 FRCP should be denied and that defendants' motion for an oral dismissal pursuant to Rule 12 FRCP must also be denied upon the grounds that the defendants herein are incompetent to raise any issues pursuant to the provisions of 933(b).

Dated: New York, New York
May 18, 1978.

Edward D. Lory

REPLY AFFIDAVIT OF J.T. STEARNS
(Pages 50a to 60a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendants. I make this affidavit in reply to the affidavit of plaintiff's counsel, Edward Lory, in opposition to defendants' motion for dismissal of plaintiff's complaint on grounds that plaintiff's cause of action was assigned by operation of law prior to institution of suit, and for summary judgment because plaintiff's claims raise no real issue of defendants' liability.

2. Plaintiff's affidavit erroneously and without any basis asserts the defendants'

factual recitation is predicated upon the doctrine of assumption of risk and then offers the proposition that since the 1972 Amendments to the LHWCA eliminated any defense by the shipowner based on assumption of risk, summary judgment should be denied.

3. Defendants' recitation of facts is based solely upon the testimony of plaintiff at his examination before trial. The defendants' neither implicitly nor impliedly raise the doctrine of assumption of risk as a defense in this action. The testimony was submitted solely for the purpose of giving the court the necessary information relating to plaintiff's claim of alleged negligence on the part of the shipowner so that it can properly determine whether or not summary judgment on the issue of liability is proper in this case.

4. The 1972 Amendments to the LHWCA limited the circumstances under which longshoremen could recover damages from shipowners, declaring that the land based principles of negligence should be applied as a standard of care for vessels boarded by dock workers. However, the principles of negligence applicable in LHWCA actions are not limited necessarily to those relative to the condition and use of land. The amendments abolished the doctrine of unseaworthiness, eliminated the concept of non-delegable duty to provide a safe place to work and relieved shipowners from liability predicated upon the negligence of stevedore companies.

5. This Circuit has added its interpretation to the clear language of the 1972 Act in numerous cases the most recent being Cox v. Flota Mercante Grancolombiana, decided May 10, 1978 (Docket #77-7338) a case this court heard at the trial

level. The application of the law as stated in the Cox case clearly requires the granting of summary judgment dismissing plaintiff's complaint in the present action. Plaintiff's affidavit states that summary judgment should be denied on two grounds: (1) the question of whether or not there was sufficient lighting raises an issue of fact concerning shipowner's negligence that should be determined by a jury; (2) whether the manhole arrangement described constituted a reasonably safe arrangement for ingress and/or egress into and/or out of the hatch should be determined by a jury.

6. The second issue raised in plaintiff's affidavit is without merit and may easily be disposed of by referring to plaintiff's deposition testimony and to the Cox decision. Referring to the trial court's charge relating to the shipowner's duty to provide a safe place to work the Cox court stated: "This charge, in effect, was merely a

reiteration of the pre-1972 law which imposed on the shipowner a non-delegable duty to provide the employee of an independent contractor with a safe place to work. It was exactly this legal principle which Congress intentionally changed." Id. at 12. Whether there is liability because of the manhole arrangement is therefor a question of negligence. There is no warranty of safe egress under the "New Act". This might be a question of fact were it not for plaintiff's testimony that the manhole arrangement was not unusual. A genuine issue of fact is not created by an attorney's argument after the fact that the arrangement must have been unsafe, which is clearly derivative from the fact that the accident occurred. Plaintiff admitted that the arrangement was not unusual and, hence, not unsafe, and no competent offer to prove the contrary has been made. This second issue raised by plaintiff's counsel is without any

support in the law or in the facts before this court, and does not raise any genuine, material issue of fact for purposes of the present motion.

7. The sole remaining issue that plaintiff raised as grounds for the denial of defendants' motion for summary judgment is the question of whether or not the failure of sufficient lighting presents a genuine, material issue of fact upon which the negligence of the shipowner can be predicated.

8. In analyzing the cases in this circuit and others, it is now apparent that a longshoreman's claim against the shipowner should not be permitted when the ship has relinquished control of the operation which led to the injury. Munoz v. Flota Mercante Grandcolombia, S.A., 550 F.2d 142 (3 Cir. 1977), Hickman v. Jugoslavenska Linijska Plovidba Ryika "ZVIR", Docket No. 77-7274 (2 Cir., February

2, 1978), Ruffino v. Scindia Steam Navigation Co., Ltd., 559 F.2d 861 (2 Cir. 1977). In this case the ultimate issue is not whether there was sufficient light but whether or not the shipowner had a duty to provide means to make the light sufficient as claimed by plaintiff. Defendant, for purposes of argument only, assumes the light was insufficient; however, it vigorously maintains that the light was sufficient, as this court might safely conclude because of the time of day (4:45 p.m.); the time of year (September) and the fact that plaintiff was admittedly within a foot or two of the open masthouse door used moments before by other members of his gang.

9. If there was no duty to provide "sufficient" light, there, of course, can be no basis for a finding of negligence on the part of the shipowner. The Munoz court in dismissing plaintiff's complaint, stated, in part:

> "...It would, in our view, contravene the clear Congressional intent and

> scheme to approve recovery against Grandcolombiana in this case. The shipowner had no duty (emphasis added) to supervise the minute details of work totally entrusted to the competence of the stevedore. Supra at p. 840-841.

10. As stated by the Cox court, the responsibility for the safety of the longshoreman was on the stevedore and it had the responsibility to ensure the pins were in place. Id. at p. 9. In this case, if the light were insufficient, it was the stevedore's responsibility to remedy the situation and not the shipowners. The stevedore alone is further charged with the mandatory requirements of the Safety and Health Regulations for Longshoring, 29 C.F.R. 1918 et seq. Those requirements state (a) All means of access and walkways leading to working areas as well as the working areas themselves shall be adequately illuminated; (e) Employees shall not be permitted to enter dark spaces without a suitable portable light. 29 C.F.R. 1915.52 (a) (e).

11. In this case the discharging operation was entrusted to the stevedore alone and he knew when and where the employees were working and he was responsible for the safety of the longshoreman in the discharging area. As the Cox court concluded: "In view of the overwhelming decisional authority the shipowner had no duty to supervise the operation entrusted to the stevedore alone. Supra, at p. 11.

Finally, even if we were to assume there was a duty owed on the part of the shipowner, the necessary actual notice of the alleged insufficient lighting would have had to be brought to the attention of the shipowner, through its employees, so he could have a reasonable opportunity to remedy the situation. In this context, there is not even any suggestion, much less evidence, that the shipowner was advised of the alleged insufficient lighting and in that respect plaintiff's complaint

also fails as a matter of law. Cox v. Flota Mercante Grancolombiana, supra. See, also Espinoza v. United States Lines, Inc., 444 F. Supp. 405 (S.D.N.Y. 1978).

POINT II

In regard to plaintiff's opposition to dismissal based on 33 U.S.C. §933(b) it is totally invalid to say that defendants' Exhibit "C" does not represent a formal order solely on the basis that it lacks the signature of the Deputy Commissioner. The signed agreement clearly indicates that the undersigned "agree by the issuance of a Compensation Order." The case law in this circuit supports the fact that the agreement reflected in Exhibit "C" is sufficient for purposes of the statute. The second circuit, at least interprets §933(b) literally. See Liberty Mutal Ins. Co. v. United States, 290 F.2d 257 (2 Cir. 1961). Moreover, the formality insisted upon by plaintiff is not required.

See, e.g., Toomey v. Waterman Steamship Corp., 123 F.2d 718 (2 Cir. 1941); Cupo v. Isthmian Steamship Co., 56 F. Supp. 45, 47 (S.D.N.Y. 1941). Indeed, the 1972 Amendments changed §933(b) to add the words "or board" making an order of such as a claims examiner sufficient to trigger the statutory assignment.

JOSEPH T. STEARNS

(Jurat omitted in printing.)

OPINION OF HON. ROBERT L. CARTER.

(Printed in the Supplemental Appendix to Petition as Appendix E at pages 1e to 39e.)

AFFIDAVIT OF EDWARD D. LORY IN OPPOSITION
(Pages 62a to 66a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

State of New York)
ss.:
County of New York)

EDWARD D. LORY, being duly sworn, deposes and says:

That as an associate attorney in the law firm of ZIMMERMAN & ZIMMERMAN, the attorneys for the plaintiff herein, he is familiar with the prior proceedings had in the within action.

That he hereafter responds to the Court's invitation for a plaintiff to address himself to the "conflict of interest" issue.

However, before addressing that issue, deponent respectfully states that the Court here erroneously concluded that an order issued upon an agreed settlement between the parties and a formal compensation order are one and the same except as to form. In point of fact where a claim is disposed of by settlement, the

claimant retains his right, without time limitation, to reopen that claim. However, where a claim is disposed of by formal order, then the claimant's time to reopen that claim expires after one year.

Returning to the conflict issue, that very issue was discussed with Mr. Albert P. Cerrachio, an International Terminal Operating Co., Vice President. (ITO was the plaintiff's employer on the date of injury and the potential assignee of his claim pursuant to the Act.) Mr. Cerrachio orally advised deponent that as a matter of company policy ITO did not in the past bring, maintain and/or assume the prosecution of an action against a shipowner and will not in the future bring, maintain and/or assume the prosecution of any action against a shipowner. Mr. Cerrachio, although pressed to do so, declined to make further comment. However, Mr. Cerrachio gave

permission to be quoted as hereinbefore set forth.

Although Mr. Cerrachio did not explain the basis of ITO's policy decision, one need only look to the CCA 2d Opinion in Valentino v. Rickners Rhederee, 522 F.2d 466, 1977 AMC 618 for the universal reason as said reason was reported to the Court by both counsel:

> "That stevedores do not, as a practical matter, pursue these law suits - presumable for fear of antagonizing their - customers."

Therefore, this Court must recognize the practical fact that stevedores are hired only by shipowners and that only a stevedore with a suicidal tendency would sue a shipowner as the assignee of its employee's claim.

Accordingly, it must follow that the employer's assign's interest and the injured employee's interest are at odds rather than mutual for the reason

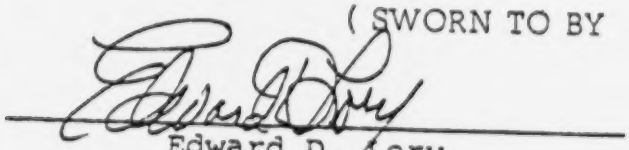
that stevedores assume compensation exposure and payments as business costs without regard to the rights and expectation of the injured employee with respect to the fruits of a law suit.

Further, therefore, deponent respectfully requests this Court to recognize and accept the conclusion that business practicalities preclude a mutual interest in the assignee employer and the injured employee so that under the premises of the within action the injured plaintiff employee here must helplessly watch his claim for relief languish to the benefit of no one but the alleged defendant tort feasor. Support that this result was never intended by the Congress is apparent since the foregoing result does not compel the shipowner to zealously pursue safety as the Congress intended.

WHEREFORE, deponent respectfully submits that where the business practicalities

of the assignee employer conflict with the interest of the injured employee, that the absence of a common and mutual intended result on the part of the said assignee employer and the injured employee precludes the statutory assignment of the injured employee's cause of action so that the injured employee retains his right to his claim and defendant's motion here to deny the injured employee that right must be denied.

(SWORN TO BY



Edward D. Lory

ON NOV. 27,1978)

AFFIDAVIT OF JOSEPH T. STEARNS RE SETTLEMENT PROPOSED ORDER (Pages 67a to 72a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of Walker & Corsa, attorneys for defendants herein. I make this affidavit in conjunction with the submission of an Order granting dismissal of plaintiff's complaint on grounds that suit against the defendants was not brought within six months of an order of the Federal Workmen's Compensation Board awarding compensation and that as a result plaintiff's action is untimely brought against the shipowner, as the claim asserted by plaintiff has been assigned by operation of 33 U.S.C. 933(b) to his former employer,

International Terminal Operating Co., Inc.

2. This motion was made April 21, 1978 and was contested by the attorneys for the plaintiff. On September 13, 1978 the court's decision of September 12, 1978 disposing of the motion to dismiss on grounds of the statutory assignment as well as under Rule 56 FRCP for summary judgment on the question of shipowner's liability to plaintiff on the facts described in his pre-trial deposition (which aspect of the motion was denied) was filed. The court's opinion provided that decision on the motion to dismiss on grounds of the statutory assignment was reserved pending discovery to be completed within 60 days of the opinion. At issue, of course, was the plain language of 933(b) and the possibility that the plaintiff could escape its effect upon demonstration

of a conflict of interest between himself and his former employer.

3. It is obvious that the court expected that the attorneys for plaintiff, in view of their activity in this court on behalf of longshoremen claiming injury aboard ships, would have taken depositions or resorted to other discovery for purposes of demonstrating the conflict of interest which this court held necessary in order for plaintiff to escape the literal application of §933(b). No effort to make the showing required by the court's opinion has been made. Instead, on or after November 27, 1978 plaintiff, more than 60 days from the court's decision, filed an untimely attorney's affidavit purporting to inform the court of an inconclusive alleged telephone conversation with a representative of International Terminal Operating Co., Inc. Defendants' motion was made under 933(b) and for procedural purposes under

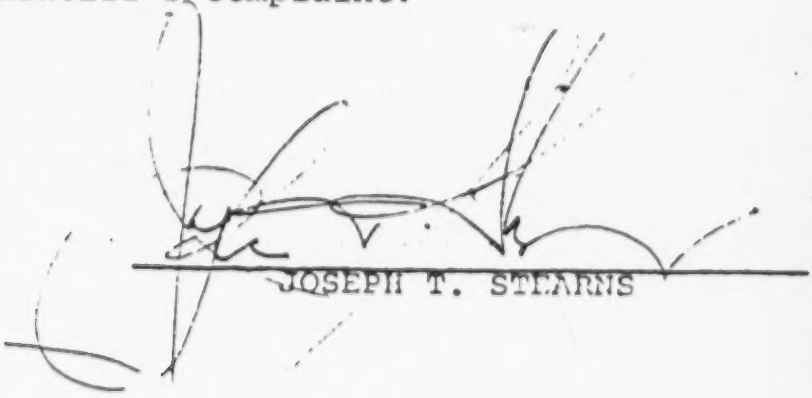
Rules 12 and 56 FRCP. Perhaps judgment on the pleading (Rule 12) was in the first instance properly invoked. However, the court's decision clearly brought the matter within Rule 56 (summary judgment) by allowing plaintiff a question of fact regarding conflict of interest. Rule 12 , of course (sebsection (b)), provides that a Rule 12 motion becomes a motion for summary judgment under Rule 56 when "matters outside the pleadings are presented." This is clearly so here. Rule 12 also provides that all parties have "reasonable" opportunity to present all material made pertinent by Rule 56. Certainly, 60 days is a "reasonable" opportunity accorded plaintiff to make the showing required.

4. Rule 56(e) provides, however, that affidavits in support or opposition to a summary judgment motion"...shall be made on personal knowledge, shall set forth such facts as would be admissible

in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The Rule further provides that a party may not rest on mere allegations or denials in his pleadings but "must set forth specific facts showing there is a genuine issue for trial."

5. Plaintiff has not complied with Rule 56. His response was untimely, incomplete, unclear, subject to a hearsay objection and is in sum, woefully inadequate. Mr. Lory's affidavit is so insubstantial as to be an affront to the court, particularly in light of the concern demonstrated by the exhaustive treatment of the issue in the court's opinion of September 12, 1978. Giving effect to Rule 56(e) requires this court to conclude that no showing of conflict has been made, forgetting for the moment that the purported showing is untimely.

6. The motion under 933(b) should now be granted in accordance with the court's memorandum and order of September 12, 1978. No conflict of interest having been demonstrated and there being no reason to presume the existence of such a conflict in absence of such proof, it is appropriate for the court now to dismiss plaintiff's complaint.



(Jurat omitted in printing.)

ORDER OF DISMISSAL DATED DECEMBER 6, 1978
(Pages 73a to 75a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendants having duly moved this court by notice of motion dated April 21, 1978 for an order pursuant to Title 33 U.S.C.A. §933(b) dismissing this case because not brought within six months of an award of compensation and said motion having regularly come on to be heard before the Honorable Robert L. Carter, to whom this case is assigned for all purposes, on May 5, 1978

NOW, upon reading and filing the affidavits of JOSEPH T. STEARNS, duly sworn to the 21st of April and 29th of November, 1978, and the affirmation in opposition to the motion of Edward D. Lory executed May 18, 1978 and due deliberation having been had thereon, and the court by memorandum and order filed

September 13, 1978 having reserved decision on the said motion to dismiss pursuant to Title 33 U.S.C.S. §933(b) pending opportunity for plaintiff, through discovery to be completed within 60 days, to demonstrate a conflict of interest between plaintiff and International Terminal Operating Co., Inc., plaintiff's former employer and the stevedore engaged to load and/or discharge cargo aboard defendant's vessel on the day of the alleged accident, sufficient to avoid application of the literal language of the said statute; and the attorney for plaintiff having made no showing of the existence of any such conflict of interest and having made no effort to take any discovery for this purpose, and the 60 days provided by the court having elapsed it is

ORDERED that the motion pursuant to Title 33 U.S.C.A. §933(b) to dismiss this case for failure to commence suit

within six months of an award of compensation be and hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice and with costs to the defendants.

Dated: New York, New York
December 6, 1978

Robert L. Carter
U.S.D.J.

PLAINTIFF'S NOTICE OF MOTION TO VACATE DISMISSAL (Pages 76a to 79a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

S I R S:-

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law, the plaintiff will move this Court before The Honorable Robert L. Carter, U.S.D.J., for an Order pursuant to Rule 60(b) vacating the Order of Dismissal filed December 8, 1978, and granting to the plaintiff a rehearing on defendant's motion for summary judgment upon the grounds:

I. That the Court in its opinion herein quotes the regulations 20 C.F.R., Sec. 702.315 (a) as holding it to be an "explicit command" to embody the agreement of settlement in a formal compensation order. The Court has overlooked the regulation which does not command the entry of an order. To the contrary, the regulations permit the entry of an order or a memorandum.

II. That the Court was in error in holding that based on "the way in which administrative agencies perform their function" and because the regulations empowered the Deputy

Commissioner to delegate his duties to a delegee, there is "no reason to believe that the claims examiner who presided over the informal conference" was not his delegee. The Court concluded erroneously that the "ordering of compensation by a claims examiner or any other delegee of the Deputy Commissioner" satisfies the purpose of the award requirement. But the Court has been misled as 20 C.F.R. Sec. 702.312 states that no one may issue a compensation order except the Deputy Commissioner; that the designee is not authorized to issue such an Order; the Deputy Commissioner does not have the power to authorize anyone to issue a compensation order.

III. That the Court had overlooked the Statute itself and the regulations when it held that "no statutory purpose is furthered by requiring the endorsement of an actual Deputy Commissioner on an award." The statute specifically states that before an order be issued there must be a determination by the Deputy Commissioner that it is in the best interests of the injured employee.

To call such a determination or adjudication a technicality and the non entry of an Order after settlement a "technical administrative lapse" is contrary to the intent of Congress and the meaning of the statute and regulations.

IV. That the Court was in error in holding that "the settlement agreement is a compensation order." This holding is not only contrary

to the decision of the Supreme Court in Intercounty Construction Corporation, et al. v. Noah C.A. Walter, etc. 422 U.S. 1, 95 S. Ct. 2016.

V. That since the Claims Examiner is not authorized to issue a compensation order; since the Deputy Commissioner cannot empower the Claims Examiner to make an order; and since the Deputy Commissioner must make a determination or adjudication that it is in the best interests of the employee before an order is filed, the Court was in error in filing a report of a settlement on an informal conference signed by a Claims Examiner to be the equivalent of a compensation order. If the Claims Examiner cannot make an order, his acts cannot be construed to constitute an order.

There being no order, formal or informal, the six-month period does not run as a result of the compensation settlement herein.

PLEASE TAKE FURTHER NOTICE, that the within motion will duly come on to be heard at the United States District Courthouse for the Southern District of New York at Foley Square, City and State of New York, on the 29th day of December, 1978 at 10:00 A.M. in the forenoon

of that day and/or at a date and time

that the Court may hereinafter direct.

Dated: New York, New York
December 15, 1978

Yours, etc.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

By /s/ Morris Cizner
Office & P.O. Address
160 Broadway
New York, New York 10038

TO: WALKER & CORSA, ESQ.
Attorneys for Defendant
25 Broad Street
New York, New York 10004

MEMO ENDORESEMENT DATED JAN. 18, 1979,
DENYING MOTION.

JANUARY 17, 1979

Motions to vacate judgment and for a Rehearing denied.

So Ordered

Robert L. Carter

U.S.D.J.

OVAL STAMP OF

U.S. DISTRICT COURT
FILED
JANUARY 18, 1979
S.D.N.Y.

AFFIDAVIT OF JOSEPH T. STEARNS IN OPPOSITION
(Pages 81a to 83a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

JOSEPH T. STEARNS, first being duly sworn, deposes and says:

1. I am an attorney-at-law and member of Walker & Corsa attorneys for defendants. I submit this affidavit in connection with the settling of a proposed order offered by Zimmerman & Zimmerman, attorneys for plaintiff in disposition of defendants' motion to dismiss pursuant to §933(b) of the Longshoremen's and Harbor Worker's Compensation Act. This motion was decised by Memorandum and Order filed September 13, 1978.

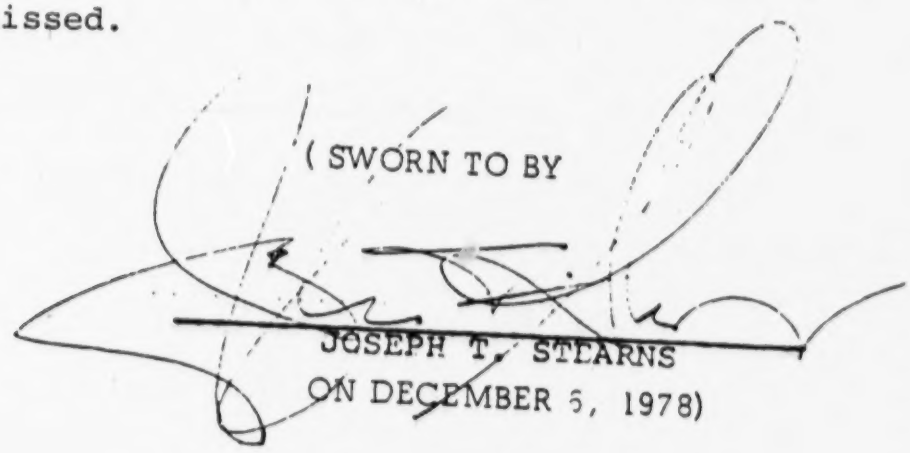
2. The motion was, in essence, granted subject to proof within 60 days of a conflict of interest between plaintiff's

former employer and plaintiff. Plaintiff's 60 days expired about November 11, 1978, without any effort being made by the attorneys to make the required showing. Defendants have submitted a proposed order granting dismissal upon this basis. In response, the attorneys for plaintiff submitted an order extending their time retroactively to take testimony for the purpose of attempting to make the required showing.

3. It is our belief that this is not the true function of the settling of an order after a decision by the court. It is not proper to put in an order extending time retroactively without moving by order to show cause or notice of motion for relief in the form of a material change in the court's tentative disposition of a litigated motion. We, accordingly, object to plaintiff's efforts to extend his time after the time provided by the

court had elapsed.

4. We also should note in connection with the submission and settlement of our own order dismissing this case on the basis of the court's September 13, 1978 decision, that plaintiff's order concedes that its affidavit, tardily presented, which was all that was offered for the point is "insufficient pursuant to F.R.C.P. Rule 56". This is a confession that the showing required by the court with respect to conflict of interest has not been made. For this reason, among others, this matter should be finally dismissed.



NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Notice is hereby given that the plaintiff herein, FREDERICO RODRIGUEZ, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of dismissal dated December 6, 1978 (docketed December 8, 1978) and from the Order dated January 17, 1979 denying plaintiff's motion for vacatur and rehearing.

Yours, etc.

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

By:
160 Broadway
New York, New York 10038
(212) 227-1350

WALKER & CORSA, ESQS.
Attorneys for Defendants
Compass Shipping Co. Ltd. and
D. Jakarta Lloyd P.N.
25 Broad Street
New York, New York 10004
(212) 344-4700

STIPULATION AS TO EXHIBITS.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

The undersigned parties hereby stipulate and agree that the attached exhibits shall become part of the Record on Appeal in the captioned matter:

A. Agreement, dated November 4, 1974;

B. U. S. Department of Labor letter, dated September 4, 1973.

Dated: New York, New York
February 27, 1979

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff

/s/ _____

WALKER & CORSA,
Attorneys for Defendants

/s/ _____

EXHIBIT A, ANNEXED TO FOREGOING STIPULATION.

(Same as Exhibit C, Annexed to Affidavit of Joseph T. Stearns, printed, *supra*, at pp. 41a to 42a.)

EXHIBIT B, ATTACHED TO FOREGOING STIPULATION
(Pages 87a to 88a.)

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
1515 Broadway (At West 44th St.)
New York, NY 10036

Office of Workers Compensation Programs
May 22, 1978

File No: 2-29100
Re: Federico Rodriguez
Vs: I. T. O. #73-692
Inj: 9/4/73

Israel, Adler, Ronca & Gucciardo
Attorneys at Law
ATTN: Angelo C. Gucciardo, Esq.
160 Broadway
New York, New York 10038

Dear Sirs:

Reference is made to your letter dated May 19, 1978 concerning the compensation case of the above captioned claimant.

You advise in your letter that a third party case is pending in the U.S. District Court and that "A serious question of Law has been presented to the Court and before a decision can be made it must be determined whether or not the attached stipulations reflecting an agreement entered into on November 4, 1974 constitutes a Formal Order."

Review of our file shows, as you indicate, that the parties had stipulated to the issues on the claim. The self-insured employer voluntarily made payment of the compensation in accordance with the stipulations.

To the present, a Formal Order has not been issued.

It is hoped that the above is responsive to your inquiry.

Sincerely,

Michael J. Collura

MICHAEL J. COLLURA
Acting Deputy Commissioner

cc: Mr. Federico Rodriguez, Apartment 11-G, 589 Amsterdam Avenue, New York, New York 10024

JSB/mw

Attachment

79-7630

United States Court of Appeals

FOR THE SECOND CIRCUIT

SRECKO BARULEC,

Plaintiff-Appellant,

—against—

OVE SKOU, R.A.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant
160 Broadway
New York, N.Y. 10038
(212) 227-1350

HAIGHT, GARDNER, POOR & HAVENS,
One State Street Plaza
New York, N.Y. 10004
(212) 344-6800

DOCKET ENTRIES (Pages 91a to 92a.)

Date	NR.	Proceedings
2-22-78	1	Fld Complaint.. Issued Summons.
3-9-78	2	Fld Summons and marshals ret. Served Ove Skou R.A. & South African Marine Corp. on 2-24-78
3-27-78	3	Fld Certificate of mailing of Summons & complaint by registered mail, addressed to: OVE SKOU H.C. ANDERSEN's BOULEVARD 44-46 DK 1553 Copenhagen 5, Denmark receipt #224464 Served:
8-14-78	4	Filed deft's Answer to Complaint (HGP&H)
8-14-78	5	Filed deft's Interrogatories
8-14-78	6	Filed deft's Notice of Examination of pltff on 9-28-78
10-30-78	7	Fld pltffs. answers to interrogs.
12-8-78	8	Fld defts. Notice of Motion for leave to serve & file an amended answer & for summary judgment pur to rule 15 FRCP & 56 FRCP. Ret. 12-29-78. hgph
12-8-78	9	Fld dfts. Memo. of Law.
2-13-79	10	Fld Dfts. Reply affdvt.
2-13-79	11	Fld Dfts Reply Memo of Law.

PREVIOUS PAGE WAS BLANK

Date	NR.	Proceedings
6-4-79	12	Filed Opinion #48661. dfts. motion to amend answer granted. dfts. motion for summary judgment. denied without prejudice Motion & renewed motion after 45 days. So Ordered Lasker J (mn)
7-19-79	13	Filed Dfts. Notice of Motion & Supporting papers renewing dfts. motion for summary judgment pur to rule 56 FRCP, etc. Ret. 7-27-79 hgph
8-3-79	14	Filed Pltffs. Affdvt in opposition to Morris Cizner.
8-10-79	-	Filed Memo Endorsed on deft's motion for summary judgment. Motion is granted for summary judgment dismissing this action...Lasker, J. m/n
8-15-79	15	ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed... Clerk.
9-4-79	16	Filed Pltffs. Notice of Appeal from judgment. ent. 8-8-79, (mailed notice to Haight Bardner Poor & Havens 1 St Street. Plaza, nyc 10004)

NOTICE OF MOTION FOR LEAVE TO SERVE AND FILE AN AMENDED ANSWER AND FOR SUMMARY JUDGMENT (Pages 93a to 95a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

SRECKO BARULEC,

Plaintiff,

-against-

OVE SKOU R. A.,

Defendant.

78 Civ. 786 (MEL)

- -X

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavit, Exhibits, Memoranda, Rule 9(g) Statement and all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Morris Lasker in Room 1903 at the United States Courthouse, Foley Square, City, County and State of New York on the 29th day of December, 1978, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for

an order pursuant to Rule 15 of the Federal Rules of Civil Procedure granting leave to serve an Amended Answer and an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting Summary Judgment dismissing the Complaint of the plaintiff against the defendant, on the ground that plaintiff's cause of action against this defendant, if any, has been assigned, pursuant to 33 U.S.C. §933(b), to the plaintiff's employer and for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that you are required to serve your response, if any, at least three (3) days prior to the return date of this motion.

Dated: New York, New York
December 8, 1978

Yours, etc.,

HAIGHT, GARDNER, POOR
& HAVENS,
Attorneys for Defendant

BY:
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:
ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

STATEMENT PURSUANT TO RULE 9(g) (Pages 96a to 97a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendant contends that there is no genuine issue to be tried as to the following material facts:

1. Plaintiff commenced this suit on February 22, 1978 to recover damages for injuries allegedly sustained on January 6, 1975 under circumstances bringing the unjuries within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

2. Plaintiff filed a claim for compensation benefits from his employer under the Longshoremen's and Harbor Workers' Compensation Act.

3. This claim was adjudicated by the United States Department of Labor at a conference on February 11, 1976 at which time an award was issued.

4. Plaintiff was paid and accepted compensation for the injuries alleged in the Complaint under an award in a compensation order dated February 11, 1976.

Dated: New York, New York
December 8, 1978

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant

By:
One State Street Plaza
New York, New York 10004
(212) 344-6800

AFFIDAVIT OF RICHARD K. MATANLE II (Pages 98a to 101a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

RICHARD K. MATANLE II, being duly sworn, deposes and says:

I am an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for the defendant Ove Skou R.A. I submit this Affidavit in support of the motions of Ove Skou R.A., for leave to serve an amended pleading pursuant to F.R.C.P. 15(a) in the form annexed hereto (Defendant's Exhibit A) and for Summary Judgment pursuant to F.R.C.P. 56 on the grounds that the plaintiff in this action has assigned any cause of action against this defendant to his employer.

Plaintiff commenced this action by the filing of a Complaint in the United States District Court for the Southern District of New York on February 22, 1978. Plaintiff seeks to recover damages for injuries allegedly sustained on January 6, 1975 while working in the employ of Universal Maritime Service Corp., and assisting in the discharge of the defendant's vessel, the M/S MEETE SKOU. Defendant served an Answer to the Complaint on August 14, 1978.

The records of the United States Department of Labor, Office of Workers' Compensation Program reveal that plaintiff filed a claim for all benefits to which he was entitled under the Longshoremen's and Harbor Workers' Compensation Act for the injuries allegedly sustained on January 6, 1975, (Defendant's Exhibit B). Thereafter, compensation was paid without an award from January 10, 1975

until March 14, 1975. (Defendant's Exhibits C and D). On March 25, 1975, a claim for additional compensation was made by the representative of the plaintiff and a conference in the matter was requested at that time as well as in later letters of August 18, 1975 and December 22, 1975. (Defendant's Exhibits E, F and G). Thereafter a conference was held on February 11, 1976 before the United States Department of Labor, Compensation Board at which time a settlement of this claim was reached. (Defendant's Exhibit H). Payment of compensation in accordance with this award was made by the compensation insurance company and notice of this payment was given to the United States Department of Labor on February 13, 1976. (Defendant's Exhibit I).

In accordance with the above stated facts, plaintiff accepted compensation under an award dated February 11, 1976 and did not commence suit in this matter until February 22, 1978, more that six months after the date of the

award. Such being the case, plaintiff is not entitled to prosecute this action since all rights of the plaintiff to recover damages against any third party, including the defendant, have been assigned to plaintiff's employer. 33 U.S.C. §933(b).

WHEREFORE, defendant respectfully requests that this Court grant its motions for leave to serve and file an Amended Answer and for Summary Judgment based on the grounds that plaintiff's cause of action, if any, has been assigned to his employer pursuant to 33 U.S.C. §933(b).

s/ RICHARD K. MATANLE II

(Jurat omitted in printing.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 102a to 108a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

Defendant, by its attorneys, Haight, Gardner, Poor & Havens, answering the Complaint of the plaintiff herein, respectfully alleges upon information and belief as follows:

FIRST: Admits each and every allegation contained in Paragraphs I, II, and V of the Complaint.

SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs III, VIII, IX, and XI of the Complaint.

THIRD: Denies each and every allegation contained in Paragraphs IV, X, XIV, XV, XVI, XVII, and XVIII of the Complaint.

FOURTH: Admits that at all the times mentioned, the defendant manned said vessel and its master, officers and crew were on board said vessel and

in possession of same, except for those parts and portions of the vessel, her gear, appurtenances, equipment and appliances turned over the stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph VI of the Complaint.

FIFTH: Admits that at all the times mentioned, the defendant managed, operated, maintained and controlled said vessel, except for those parts and portions of the vessel, her gear, appurtenances, equipment and appliances turned over to stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph VII of the Complaint.

SIXTH: Admits that at all the times mentioned, the defendant maintained hatch No. 5 of said vessel, except for those parts and portions of the vessel, her

gear, appurtenances, equipment and appliances turned over to stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph XII of the Complaint.

SEVENTH: Admits that at all the times mentioned in the Complaint, the said hatch No. 5 of said vessel was a part of said vessel and was maintained, supplied and provided by defendant to longshoremen for use in connection with the performance of their stevedoring work on board said vessel, except for those parts and portions of the vessel, her gear, appurtenances, equipment and appliances turned over to stevedores, longshoremen and/or independent contractors, but except as so specifically admitted, denies each and every allegation contained in Paragraph XIII of the Complaint.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIRST SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

EIGHTH: That if plaintiff sustained any injuries as alleged in the Complaint, the same were caused or contributed to by his own negligence, the negligence of his co-employees, the negligence of his employer, or the negligence of others for whose actions the defendant is not liable.

FURTHER ANSWERING THE COMPLAINT AND FOR A SECOND, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

NINTH: That plaintiff's employment had certain risks incident thereto which were obvious and well known to plaintiff at all times during said employment and during the continuance thereof; that whatever injuries plaintiff received

in the course of said employment and which are complained of by said plaintiff herein arose because of said risks, all of which were taken and assumed by plaintiff at the time he first entered upon said employment and during the continuance thereof.

FURTHER ANSWERING THE COMPLAINT AND FOR A THIRD, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

TENTH: That the cause of action set forth in the Complaint is barred by laches and/or the appropriate statute of limitations.

FURTHER ANSWERING THE COMPLAINT AND FOR A FOURTH, SEPARATE PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

ELEVENTH: The Court lacks jurisdiction over the person of the defendant.

FURTHER ANSWERING THE COMPLAINT AND FOR A FIFTH, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

TWELFTH: The Court has no jurisdiction over the person of defendant due to insufficiency of service of process.

FURTHER ANSWERING THE COMPLAINT AND FOR A SIXTH, SEPARATE, AFFIRMATIVE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF AS FOLLOWS:

THIRTEENTH: Repeats and realleges each and every admission, denial of knowledge or information and allegation hereinabove set forth with the same force and effect as if set forth at length herein.

FOURTEENTH: That plaintiff accepted compensation for the injuries alleged in the Complaint under an award in a compensation order.

FIFTEENTH: That plaintiff commenced suit to recover damages for the injuries alleged in the Complaint more than six months after the award of compensation alleged in Paragraph FOURTEENTH of this Amended Answer.

SIXTEENTH: That any claim that plaintiff may have against this defendant for the injuries alleged in the Complaint has been assigned to plaintiff's employer pursuant to 33 U.S.C. §933(b).

WHEREFORE, defendant demands judgment dismissing the Complaint of plaintiff, together with costs and disbursements of this action.

Dated: New York, New York
December 6, 1978

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant

BY:
A Member of the Firm

One State Street Plaza
New York, New York 10004

EXHIBIT B, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 109a to 112a.)

U.S. Department of Labor
Wage and Labor Standards Administration
Bureau of Employees Compensation

EMPLOYER'S FIRST REPORT OF ACCIDENT OR OCCUPATIONAL ILLNESS

1. BEC Case Number

2. Carrier's Number 50530.

3. Name of Injured Employee Srecko Barulic.

4. Date of Injury January 6, 1975.

5. Employee's Address 25-77 49th Street, Astoria, L.I., N.Y.

6. Accident is Being Reported Under the Following Act (X) Longshoremen's and Harbor Workers' Compensation Act.

7. Sex (X) Male.

8. Age or Date of Birth 40.

9. Social Security Number 087-36-8324.

10. On Date of Injury Give a) Hour began Work 8:00 A.M., b) Hour of Accident 11:00 A.M. c) Did Employee Stop Work Immediately? (X) No.

11. Did Injury Cause Loss of Time Beyond Day or Shift of Accident?

12. Date and Hour Employee First did Not Return to Work

13. Date and Hour Pay Stopped

14. Date and Hour Employee Returned to Work

15. Occupation Holdman

16. Number of Years in this Occupation

17. Injured while doing such Work (X) yes.

18. Years in your Employ

19. Number of Days Usually Worked Per Week

20. If Injured on a Vessel, what was Being Done to, on, or from the Vessel A. (X) Loading or Unloading.

21. Wages or Earnings a) Hourly rate, b) Daily rate, c) Weekly, d) yearly.

22. Exact Place where Accident Occurred Pier 3 Port Authority, Brooklyn, N.Y. Vessel "METTE SHOU 12 IN".

23. Name of Foreman or Supervisor at time of Accident A. Gianotta.

24. Earliest Date Foreman or Employer knew of Accident January 6, 1975.

25. Describe in full how the Accident Occurred; while lifting bag of coffee, foot slipped on coffee beans, hurting back.

26. Nature of Injury Alleges: Injury to back.

27. If you Provided or Authorized Medical Attention, Give Date January 6, 1975.

28. Date Insurance Carrier Notified January 9, 1975.

29. Name of Physician Dr. Tagliagambe.

30. Address 110 President St., Brooklyn N.Y.

31. Name of Hospital

32. Address

33. Name of Insurance Carrier Midland Insurance Company.

34. Address 160 Water Street, New York, N.Y. 10038.

35. Name of Employer Universal Maritime Service Corp.

36. Address of Reporting Office One Broadway, New York, N.Y. 10004.

37. Nature of Employer's Business Stevedoring.

38. Signature of Person Authorized to Sign for Employer W.E. Coughlin.

39. Official Title of Person Signing this Report Assistant Vice President.

40. Date of this Report January 15, 1975.

EXHIBIT C, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 113a to 114a.)

U.S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Program

PAYMENT OF COMPENSATION WITHOUT AWARD.

1. BEC Case Number 3 P.A.

2. Carrier's Number 050530.

3. Name of Injured Person Srecko Barulic.

4. Address of Injured Person 25-77 49th Street, Astoria, N.Y.

5. Date of Accident or First Illness January 6, 1975.

6. Date Disability Began January 7, 1975.

7. Name of Injured, or Dependents of Injured, to Whom Compensation will be paid Srecko Barulic.

8. Average Weekly Wage $ Multiplied by 2/3=Compensation Rate $ TR-$105.00.

9. Compensation will be Paid from January 10, 1975.

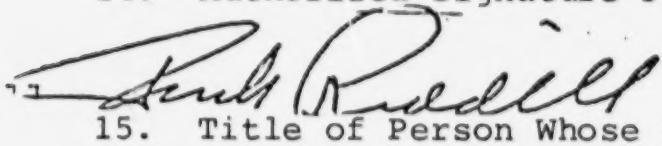
10. Date of First Payment January 17, 1975.

11. Name of Employer Universal Maritime Service Corp.

12. Address of Employer One Broadway, New York, N.Y. 10004.

13. Name of Insurance Carrier Midland Insurance Company.

14. Authorized Signature Frank Riddell



15. Title of Person Whose Signature appears on Item 14 Supervisor, Compensation Claims.

16. Date Signed January 17, 1975.

EXHIBIT D, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 115a to 116a.)

U.S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Program

COMPENSATION PAYMENT STOPPED OR SUSPENDED.

1. BEC Case Number 3 P.A.

2. Carrier's Number 50530.

3. Name and Address of Employee Srecko Barulic, 25-77 49th Street, Astoria, L.I. N.Y.

4. Name of Employer Universal Terminal & Steve. Corp.

5. Address of Employer 1 Broadway, New York, N.Y. 10004.

6. Date of Injury January 6, 1975.

7. Date Employee First did not Work Because of Injury January 7, 1975.

8. Date Physician found Employee able to Return to Work

9. Date Employee Returned to Work

10. Average Weekly wage $275.41 Multiplied by 2/3=Compensation Rate $183.61.

11. Give Reasons Why Payments have been Stopped or Suspended No further disability per attached medical.

12. Date of this Notice March 14, 1975.

13. Date Last Payment Made March 14, 1975.

14. List all Disability Payments,

a. Type of Disability, Temporary Total.

b. From January 7, 1975.

c. To March 6, 1975.

d. Amount Paid Per Week $183.61.

e. Number of Weeks Paid 8 1/7.

f. Total $1495.11.

15. List all Payments Made on Account of Death

16. Name of Insurance Carrier or Self-Insured Employer Midland Insurance Company.

17. Signature of Person Authorized to sign for Carrier Frank Riddell.

18. Title of Person Whose Signature appears in Item 17 Supervisor, Comp. Claims.

EXHIBIT E, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II.

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys at Law
160 Broadway
New York, N.Y. 10038
Telephones Barclay 7 1350-1351-1352

U. S. Department of Labor
Office of Workmen's Compensation Programs
1515 Broadway
New York, New York

RE: Stricko Barulic vs
Univ Term & Steve
U. S. #------
Carrier: Midland
D/A: 1/6/75

March 25, 1975

Gentlemen:

Enclosed, herewith, please find report of Dr. G. N. Haziris dated March 24, 1975. , which indicates that the claimant is still disabled and in need of further treatment.

We request that you kindly schedule this case for an early informal conference so that the claimant may receive his compensation benefits.

Very truly yours,

ISRAEL, ADLER, RONCA
& GUCCIARDO

SA:dg
Encl.

EXHIBIT F, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II .

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys at Law
160 Broadway
New York, N.Y. 10038
Telephones: Barclay 7 (1350 1351 1352)

August 18, 1975

U.S. Department of Labor
Bureau of Employee's Compensation
321 West 44th Street
New York, New York

RE: Stricko Barulic vs Univ Term Steve

U.S. # 2-38150
Carrier: Midland
Carrier: #50530
D/A: 1/6/75

Gentlemen:

We enclose herewith, report of Dr. George N. Haziris dated August 18, 1975.

We ask that the case be scheduled for an early conference.

Very truly yours,

ISRAEL, ADLER, RONCA
& GUCCIARDO

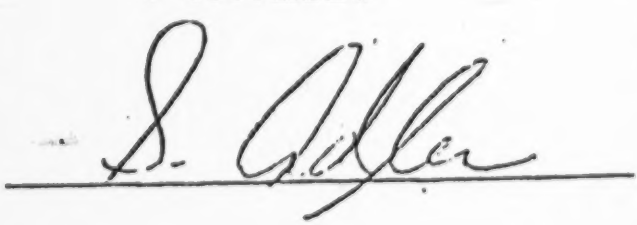


EXHIBIT G, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II.

ISRAEL, ADLER, RONCA & GUCCIARDO
Attorneys at Law
160 Broadway
New York, New York 10038
Telephones: Barclay 7 - 1350-1351-1352

December 22, 1975

U. S. Department of Labor
Office of Workmen's Compensation Programs
1515 Broadway
New York, New York

RE: Stricko Barulic vs
Univ Term & Steve
U.S. # 2 38150
D/A: 1/6/75

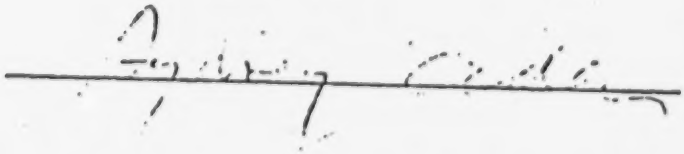
Gentlemen:

We have filed the report of Dr. George Haziris dated August 18, 1975, giving schedule loss evaluation.

We would appreciate having the case scheduled for an early conference for final disposition.

Very truly yours,

ISRAEL, ADLER, RONCA
& GUCCIARDO



SA:dg

EXHIBIT H, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 120a to 124a.)

MEMORANDUM OF INFORMAL CONFERENCE
(Under the Longshoremen's and Harbor Workers' Compensation Act, as extended)

U.S. Department of Labor
Employment Standard Administration
Office of Workers' Compensation Programs

1. Claimant Srecko Barulic.

2. OWCP File Number 2-38150.

3. Employer Universal Terminal & Steve.

4. Carrier/Employer's Number 50530.

5. Insurance Carrier Midland Ins. Co.

6. Date of Conference February 11, 1976.

7. Date of Injury January 6, 1975.

8. Appearances: (XX) Claimant present For Claimant Mr. A. Gucciardo, For Employer/ Carrier Mr. J. Downey. Issues: Disability - Temporary and permanent.

9. The Claimant sustained/alleges an accidental injury on the day in item 7 while working for the above-named employer, under the circumstances bringing the injury within the purview of the LHWC Act (33 U.S.C. 901 et seq.)

or an extension thereof, resulting in the following injury(ies): Injury to back and left hip.

10. Prior conferences were held on None the employer/carrier have paid compensation for this injury in the amount of $1,495.11 for the following periods: 1-7-75 to 3-6-75, 8 1/7 weeks at $183.61.

11. Present Claim: Temporary total disability for entire period 15% permanent partial disability left leg.

12. Employer/Carrier's Position No causally related disability after 3-6-75. No Schedule loss carrier requests exam by Impartial Consultant.

13. Average Weekly Wage (Sec. 10) $275.41 (XX) As stipulated by parties.

14. Compensation rate (2/3 x AWW) $183.61.

15. Claimant (XX) Returned to Work on April 4, 1975.

16. Medical costs related to the injury (XX) have been paid.

Upon discussion of the issues involved among those present, together with due considerations to all information in the administrative file, the following recommendation is made.

RECOMMENDATION.

Compensation is to be paid as follows:

After review of all evidence in file and considering that developed at the conference this examiner makes the following recommendation which is felt to be equitable to all parties:

Pay compensation for temporary total disability from 1-7-75 to 4-3-75, 12 3/7 weeks at $183.61, in the amount of $2,282.01, less $1,495.11 paid, leaving a balance due of $786.90.

In addition, pay compensation for 6% permanent partial disability left leg, 17.28 weeks at $183.61, in the amount of $3,172.78.

FEE.

Approved Fee: $485.00

A written application for fee for services rendered has been submitted and duly considered, and accordingly, the above fee (to include expenses) is approved in favor of: Israel, Adler, Ronca & Gucciardo, Esqs. (XX) This fee is for an attorney and is made a lien on the compensation recommended.

It has reasonably been determined in accordance with Section 702.132 of the regulations, that the above fee is adequate and reasonable for the necessary services rendered.

ACTION BY EMPLOYER/CARRIER.

The self-insured employer or insurance carrier is to submit Forms LS-206 or LS-208, showing compliance with the above recommendation. Upon completion of payment, a final Form LS-208 is to be submitted.

In the event of controversion, Form LS-207 is to be submitted.

To avoid statutory penalties all required forms should be sent to this office promptly and within the time requirements of the Act.

Frank Voelker,

(Claims Examiner)

February 11, 1976

(Date this memorandum issued)

EXHIBIT I, ANNEXED TO AFFIDAVIT OF RICHARD K. MATANLE II (Pages 125a to 127a.)

U.S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers' Compensation Program

COMPENSATION PAYMENT STOPPED OR SUSPENDED.

1. BEC Case Number 2-38150.

2. Carrier's Number 50530.

3. Name and Address of Employee Srecko Barulic 10 Irving Lane, New Hyde Park, N. Y. 11040.

4. Name of Employer Universal Terminal & Steve. Corp.

5. Address of Employer 1 Broadway, New York, N.Y. 10004.

6. Date of Injury January 6, 1975.

7. Date Employee First did not Work Because of Injury January 7, 1975.

8. Date Physician found Employee able to Return to Work.

9. Date Employee Returned to Work.

10. Average Weekly Wage $275.41 Multiplied by 2/3=Compensation Rate $183.61.

11. Give Reasons why Payments have been Stopped or Suspended As per Memorandum February 11, 1976.

12. Date of this Notice February 13, 1976.

13. Date Last Payment made February 13, 1976.

14. List all Disability Payments.

a. Type of Disability Temporary Total, b. from January 7, 1975, c. to April 3, 1975 d. Amount paid per week $183.61 e. Number of weeks paid 12 3/7. Total $2282.01.

a. Type of Disability Permanent Partial, b. Percent 6%, c. Part of Body 1/leg, d. Amount Paid Per Week $183.61, e. Number of Weeks Paid 12 3/7, 17.28 Total $3172.78.

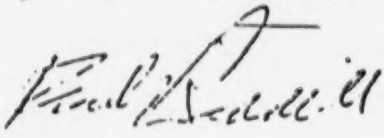
Total $5454.79.

15. List all Payments made on Account of Death.

16. Name of Insurance Carrier or Self-insured Employer Midland Insurance Company.

17. Signature of Person Authorized to

Sign for Carrier Frank Riddell



18. Title of Person Whose Signature Appears in Item 17 Supervisor, Comp. Claims.

ANSWERING AFFIDAVIT OF MARTIN LASSOFF IN OPPOSITION TO MOTION (Pages 128a to 130a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MARTIN LASSOFF, being duly sworn, deposes and says:

That I am associated with the office of ZIMMERMAN & ZIMMERMAN, the attorneys of record for the plaintiff in the above entitled action. I am fully familiar with this case and the facts set forth herein, and submit the following in opposition to defendant's motion herein.

That at the time of the accident plaintiff was a longshoreman employed by UNIVERSAL TERMINAL STEVEDORING CORP. Their Workmen's Compensation insurance carrier is the MIDLAND INSURANCE COMPANY and JOHN RICHARDSON is the claims attorney for Midland.

That JOHN RICHARDSON informs me that MIDLAND INSURANCE COMPANY has not and will not make any claim, bring an action, or maintain any action against the shipowner to recover damages for its negligence when a longshoreman is injured and the Company or its client stevedore could bring such action because to do so would prejudice their clients who fear that it would adversely affect their economic relationship with the steamship company.

That JOHN RICHARDSON was advised that this information was to be used in connection with this motion and any similar motion in any other case involving the same defense. He authorized me to quote him and report the foregoing to this Court.

It is submitted that in view of the foregoing, there is a conflict of interest between plaintiff longshoreman

and the stevedore employer and that motion should be denied.

MARTIN LASSOFF

(Jurat omitted in printing.)

REPLY AFFIDAVIT OF RICHARD K. MATANLE II IN SUPPORT OF MOTION (Pages 131a to 136a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

RICHARD K. MATANLE II, being duly sworn, deposes and says:

That he is associated with the firm of Haight, Gardner, Poor & Havens, attorneys for defendant, OVE SKOU.

This Affidavit is respectfully submitted in reply to plaintiff's affidavit and memorandum in opposition.

Plaintiff's opposition papers fail to raise any triable issues of fact sufficient to withstand defendant's present motion for Summary Judgment. Plaintiff has failed to submit any statement pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York. Consequently, the facts set forth in defendant's Rule 9(g) statement are deemed admitted

by plaintiff. Specifically the fact that plaintiff accepted compensation for the injuries alleged herein under an award in a compensation order dated February 11, 1976, as set forth in paragraph 4 of defendant's Rule 9(g) statement, is necessarily admitted for purposes of this motion.

Plaintiff would have this Court believe that defendant knew of the details of plaintiff's compensation proceedings far in advance of moving to amend its answer to assert the defense of assignment and moving on that basis for Summary Judgment. Based upon the assertion of defendant's knowledge of the compensation proceedings plaintiff thus questions the timeliness of defendant's motion to amend. The facts show however, that defendant first received complete records regarding plaintiff's compensation proceeding on November 27, 1978 when these records

were received from the United States Department of Labor pursuant to plaintiff's own executed authorization. (A copy of the Labor Department's letter of November 21, 1978 forwarding plaintiff's compensation records is annexed hereto as defendant's Exhibit A.) After reviewing plaintiff's compensation records, defendant promptly moved to amend its answer for Summary Judgment filing its motion eleven days later, on December 8, 1978. Plaintiff's vague assertion of some sort of bad faith delay on the part of defendant in moving for the relief sought herein is simply erroneous.

Plaintiff would further have the Court believe the decision by Judge Carter in Rodriguez v. Compass Shipping Co., Ltd., now reported at 456 F. Supp. 1014, which defendant has cited and a copy of which defendant attached to its original Memorandum of Law, lacks force because

a motion is pending to reargue the dismissal in that case. (A copy of the Order of Dismissal dated December 6, 1978 is annexed hereto as Exhibit B). While plaintiff in the Rodriguez case did make an application for reargument of Judge Carter's order of dismissal and to vacate that dismissal, plaintiff's motion was denied on January 17, 1979 (Defendant's Exhibit C).

The hearsay affidavit submitted by plaintiff's attorney outlining a conversation with a claims attorney representing the stevedoring company's insurance carrier is insufficient to establish any actual conflict of interest between plaintiff and his employer. Furthermore, and even more significantly, plaintiff's attorney's hearsay affidavit is insufficient as evidence submitted in opposition to a motion for Summary Judgment under Rule 56 of the Federal Rule of Civil Procedure and, as such, the alleged facts asserted

in that affidavit must be disregarded. Even if the affidavit of plaintiff's attorney was sufficient to establish the fact that the stevedore's insurance carrier probably would not bring suit against the shipowner in a particular case, this fact, if assumed, does not establish any conflict of interest between plaintiff and employer. For example, the stevedore's decision not to bring suit against the shipowner could very simply be due to the fact that upon evaluation of the case, the stevedore and/or its compensation insurance carrier have decided that facts of the case and circumstances of the accident and resulting injury do not justify an action against the shipowner.

WHEREFORE, defendant respectfully requests that this Court grant its motions for leave to serve and file an Amended Answer and for Summary Judgment based

on the grounds that plaintiff's cause of action, if any, has been assigned to his employer pursuant to 33 U.S.C. §933(b).

RICHARD K. MATANLE II

(Jurat omitted in printing.)

EXHIBIT A, ANNEXED TO REPLY AFFIDAVIT OF RICHARD K. MATANLE II.

1346

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
1515 Broadway (At West 44th St.)
New York, N.Y. 10036

November 21, 1978

File No. 2-38150
Strecko Barilec

Haight, Gardner, Poor & Havens
One State Street Plaza
New York, N.Y. 10004

Enclosed are the copies requested by your office, for which the charge is $3.05.

Upon receipt, please forward your check in the amount of $3.05.

Check should be made out to the Department of Labor, address envelope to Attention of the Undersigned.

Sincerely,

Iris Santos

Iris Santos
Telephone # 399-5276

IS:rg

Enclosure

EXHIBIT B, ANNEXED TO REPLY AFFIDAVIT OF RICHARD K. MATANLE II (Pages 138a to 140a.)

ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

FEDERICO RODRIGUEZ,

Plaintiff,

-against-

COMPASS SHIPPING COMPANY LTD. and D. JAKARTA LLOYD P.N.,

Defendants.

77 Civ. 3378 (RLC)

- X

Defendants having duly moved this court by notice of motion dated April 21, 1978 for an order pursuant to Title 33 U.S.C.A. §933(b) dismissing this case because not brought within six months of an award of compensation and said motion having regularly come on to be heard before the Honorable Robert L. Carter, to whom this case is assigned for all purposes, on May 5, 1978

NOW, upon reading and filing the affidavits of JOSEPH T. STEARNS, duly sworn to the 21st of April and 29th of November, 1978, and the affirmation in opposition to the motion of Edward D. Lory executed May 18, 1978 and due deliberation having been had thereon, and the court by memorandum and order filed September 13, 1978 having reserved decision on the said motion to dismiss pursuant to Title 33 U.S.C.A. §933(b) pending opportunity for plaintiff, through discovery to be completed within 60 days, to demonstrate a conflict of interest between plaintiff and International Terminal Operating Co., Inc., plaintiff's former employer and the stevedore engaged to load and/or discharge cargo aboard defendant's vessel on the day of the alleged accident, sufficient to avoid application of the literal language of the said statute; and the attorney for plaintiff having

made no showing of the existence of any such conflict of interest and having made no effort to take any discovery for this purpose, and the 60 days provided by the court having elapsed it is

ORDERED that the motion pursuant to Title 33 U.S.C.A. §933(b) to dismiss this case for failure to commence suit within six months of an award of compensation be and hereby is granted and the complaint herein be and the same hereby is dismissed with prejudice and with costs to the defendants.

Dated: New York, New York
December 6, 1978

Robert L. Carter

U.S.D.J.

EXHIBIT C, ANNEXED TO REPLY AFFIDAVIT OF RICHARD MATANLE II.

January 17, 1979

Motion to vacate judgment on a releasing denied.

So ordered.

U.S. DISTRICT COURT FILED JAN 18 1979 S.D. OF N.Y.

U.S.D.J.

NOTICE OF MOTION RENEWING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Pages 142a to 143a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affidavit, Exhibits and defendant's original Affidavit, Exhibits, Memoranda, and Rule 9(g) Statement filed on December 8, 1978, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Morris E. Lasker in Room 1903 at the United States Courthouse, Foley Square, City, County and State of New York on the 27th day of July, 1979 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard to renew their application for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting Summary Judgment dismissing plaintiff's action on the ground that plaintiff's

cause of action against this defendant, if any, has been assigned pursuant to 33 U.S.C. §933(b), to the plaintiff's employer and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
July 18, 1979

Yours, etc.,

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant

By Richard K. Matanle II
One State Street Plaza
New York, New York 10004

TO:

ZIMMERMAN & ZIMMERMAN
Attorneys for Plaintiff
160 Broadway
New York, New York 10038

AFFIDAVIT OF RICHARD K. MATANLE II IN SUPPORT OF MOTION (Pages 144a to 148a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

RICHARD K. MATANLE II, being duly sworn, deposes and says:

I am an attorney associated with the firm of Haight, Gardner, Poor & Havens, attorneys for defendant OVE SKOU R.A. I submit this Affidavit in support of defendant's application renewing its motion for Summary Judgment originally filed with this Court on December 8, 1978.

Plaintiff commenced this action by the filing of a Complaint in the United States District Court for the Southern District of New York on February 22, 1978. Plaintiff seeks to recover damages for injuries allegedly sustained on January

6, 1975 while working in the employ of Universal Maritime Service Corp. assisting in the discharge of defendant's vessel the M/S MEETE SKOU.

Plaintiff had previously filed a claim for compensation benefits from his employer under the Longshoremen's and Harbor Workers' Compensation Act based on the same injuries as alleged in this action, those injuries allegedly sustained on January 6, 1975. Plaintiff's compensation claim was adjudicated by the United States Department of Labor and he was paid and accepted compensation for these injuries under an award in a compensation order dated February 11, 1976.

Since plaintiff's compensation records revealed that he did not commence the action now before this Court within six months after the date of the compensation award, defendant made an application

to this Court to amend its answer to assert an additional defense of assignment based on 33 U.S.C. §933(b) and for Summary Judgment based on that defense.

Defendant's motions to amend and for Summary Judgment were filed on December 8, 1978 and were decided by this Court on May 31, 1979. (A copy of the Court's decision of May 31, 1979 is annexed hereto as Exhibit A).

In the Court's decision of May 31, 1979, defendant's motion to amend the answer to plaintiff's Complaint was granted and the Court held that under the undisputed facts of the case the action taken by the U.S. Department of Labor was sufficient to trigger an assignment to plaintiff's employer of plaintiff's right to sue defendant shipowner. The Court however recognized that a judicially created exception to an assignment under 33 U.S.C. §933(b) exists where plaintiff can show

that a conflict of interest existed between himself and his employer/assignee. The Court accordingly did not grant defendant's motion for Summary Judgment, giving plaintiff instead a period of forty-five days within which to submit competent evidence to establish that a conflict of interest between himself and his employer exists such as to exempt him from the assignment provisions of 33 U.S.C. §933(b). The Court granted defendant the right to renew its Summary Judgment motion after the forty-five day period had elapsed.

Forty-five days has since elapsed from the date of this Court's decision of May 31, 1979 and plaintiff has failed to submit <u>any</u> evidence whatsoever with regard to establishing the existence of a conflict of interest. Defendant therefore now renews its motion for Summary Judgment.

WHEREFORE, defendant respectfully requests that this Court grant its motion for Summary Judgment based on the ground that plaintiff's cause of action, if any, has been assigned to his employer pursuant to 33 U.S.C. §933(b).

RICHARD K. MATANLE II

(Jurat omitted in printing.)

AFFIDAVIT OF MORRIS CIZNER IN OPPOSITION TO MOTION (Pages 149a to 161a.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(TITLE OMITTED IN PRINTING.)

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MORRIS CIZNER, being duly sworn, deposes and says:

That I am a partner in the law firm of ZIMMERMAN & ZIMMERMAN, the attorneys of record for the above plaintiff and am familiar with the facts and circumstances herein.

Defendant moves for summary judgment based on a claim of a statutory assignment of plaintiff's cause of action. The claim is made that payment was made and accepted by plaintiff under an "award in a compensation order" triggering the assignment. Defendant also claims plaintiff has not sustained his burden of proof

that there was a conflict of interest with stevedores.

The most recent developments in the law appertaining, precludes the granting of the motion herein. The motion must be denied because: (1) Here there is no administrative order in the compensation case, and (2) If there was, defendant did not sustain his burden of proof to show that there is no conflict of interest with stevedore.

The defendant bases its claim on an Opinion of this Court as to the judge's understanding of the law in which a motion for summary judgment was denied with leave to renew. Again, in view of errors made in such Opinion and the most recent development of the law, the motion must be denied.

The Supreme Court of the United States in Edmonds v. Compagnie Generale

Transatlantique, decided June 27, 1979, No. 78-479, has clearly set forth the intent of Congress and the meaning of the 1972 Amendments to the LHWCA. It sets forth the ground rules and approach the courts must abide by in determining the application of the Statute.

It is submitted that the interpretation of the Supreme Court disagrees with the views set forth in a number of opinions heretofore issued by various judges. Our system of justice requires that such judges recognize that fact and make decisions in accordance with the Supreme Court holding. With all due respect to this Court, - this case here falls within that category and a different opinion is called for from this Court.

In Edmonds, the Supreme Court stated that the legislative history strongly counsels against the interpretation

of the Statute which modifies the longshoremen's pre-existing rights against the negligent vessel (page 9 of the Opinion). The reports and the debates leading up to the 1972 Amendments contained not one word of any changed interpretation of the rights of the longshoremen pertaining to the determination when a Memorandum of Informal Conference becomes an award under Section 933(b); it likewise does not have any discussion or statement with respect to the conflict of interest question that we are dealing with here. Since there are political ramifications involved in the passage of the 1972 Amendments, silence in the Congressional Committee Reports pertaining to the contemplation of an important and controversial change in existing law indicates that there has been no change (page 10). The Court also pointed out that Congress repeatedly refused to limit the shipowner's liability

for negligence and the intent was that a longshoreman be free to sue the vessel as heretofore by proving negligence and causation and have his total damages paid by the vessel (page 10-12). It was also pointed out that the Act seeks to protect the longshoreman and if any inequity appears "we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoremen whom the Act seeks to protect" (page 13). The Supreme Court felt that since there was no specific intent to change the Statute in respects material here, whatever rights the parties had at the time just prior to the 1972 Amendment are still applicable.

Edmonds speaks of "an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoremen's rights against the third party unless

the longshoreman sues within six (6) months". The Court also pointed out that "we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in the light of the rules of maritime law that it chose not to change". (page 15) The Court went on to say that should the courts now determine a change in the rights of a longshoreman, that would not be proper, stating: "By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance". (page 16) The Supreme Court also stated that: "Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions

would effectively alter the Statute by causing it to reach different results than Congress envisioned". (page 16) The Supreme Court pointed out that we can only "presume that Congress acted with the existing state of the law, not the probability of future judiciary change in mind".

From the foregoing it is quite clear that the law with respect to assignment, as existed prior to 1972, is applicable today and as existed at the time a formal order is required before the statutory assignment is triggered. The cases decided by the various courts since 1972 have sought to change the rights of the longshoremen and by doing so not only deprive him of his rights that existed prior to the Amendment, but did so contrary to the intent of Congress. Reliance on decisions like Rodriguez, Hernandez, Bandy, Perez and the like is relying

on that which the Supreme Court does not approve of. The Court here should not go far afield to look for reasons to deprive the longshoreman of his rights, for that was not the intent of Congress either.

Furthermore, this Court finds it interesting or compelling to note that in some cases, as in Sessa, the decisions were "premised on outdated administrative practice. Modern practice, as indicated below, authorizes considerable greater delegation of authority than was permissible at the time those cases were decided". The Court has made an error of serious proportions: Firstly, whatever administrative procedure or practice was engaged in at the time of the 1972 Amendments are equally applicable to cases today. Were it otherwise it would contravene the direction of the Supreme Court. Secondly, this Court finds some solace in citing

the regulations and concluding that "whatever may have been the regularity scheme when Sessa was decided, the regulations applicable to this case clearly authorize the Claims Examiner to make an award of compensation based on settlement reached at an informal conference".

Unfortunately, the Court was not made aware of the fact that from 1974 on the Regulations were quite specific as to who may authorize anyone to enter an order. For example, the Federal Regulations 701.301(7) defines the Deputy Commissioner as one being appointed by the Act and states that his designee is to be authorized by the Director to perform functions with respect to processing and determination of claims for compensation. Section 801.1, Subdivision (9), pertaining to the Benefits Review Board defines a Deputy Commissioner again as one appointed by the Act "or his designee

authorized by the Director to make decisions and orders with respect to claims arising under the Acts". Thus, by definition the Regulations have always required the authorization of the Director, not the Deputy Commissioner. Since Section 701-312 stated that the designee shall perform "duties set forth below assigned to Deputy Commissioner", the courts have been interpreting that to mean that the designee could enter an order but that is not correct for two reasons: First, it conflicted with the Regulations pertaining to definitions and presumably the duty referred to pertained to procedure in holding hearings, etc., and not to the entry of orders. By September 9, 1977, the Regulations were changed to clarify this very question and Section 701-312 had added thereto, "except that a compensation order following an agreement shall be issued only by a person so designated

by the Director to perform such duty". That made it consistent with the other Regulations. It also meant that a Claims Examiner did not derive the power to enter an order based on an appointment from the Deputy Commissioner. Second, how does this Court justify a reference to outdated administrative practice when the latest change or clarification in the Regulations continue the restrictions theretofore existent.

The same discussion as above pertaining to the question of conflict of interest also results in the inevitable conclusion that the courts have erroneously placed the burden on the longshoremen rather that on the shipowner to prove conflict.

It is also important to note that the Benefits Review Board has decided that a Claims Examiner does not have the authority to enter an order.

Since this Court is relying on Rodriguez, Hernandez, Bandy and Perez, the Court should be made aware of the fact that these cases are up on appeal. Annexed hereto and made a part hereof is a copy of the Brief of Plaintiff-Appellant in Rodriguez. Please note that it was written before the Edmonds case was decided. Also note that the Edmonds case supports the contents of the Brief and in particular, pages 19 to 22.

The case of Potomac Electric Power Co. v. Wynn, Jr. is the law which was in effect at the time of the 1972 Amendments, to the knowledge of Congress and unchanged by them. The principles set forth therein are equally applicable today and shipowner's burden of proving no conflict of interest has failed. The motion here, therefore, must be denied.

WHEREFORE, plaintiff respectfully requests the foregoing motion for summary judgment be denied with costs.

/s/ MORRIS CIZNER

(Jurat omitted in printing.)

MEMORANDUM OPINION OF HON. MORRIS E. LASKER, U.S.D.J., AUGUST 8, 1979 (Pages 162a to 163a.)

LASKER, D.J.

By Memorandum Opinion dated May 31, 1979, the plaintiff in this action was given forty-five days within which to submit competent evidence establishing a conflict between his interests and those of his employer sufficient to bring his case within the exception to the mandate of 33 U.S.C. §933(b) created in Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956). The defendant was given leave to renew its motion for summary judgment dismissing this action on the grounds that the plaintiff's cause of action has been assigned to his employer pursuant to section 933(b) after forty-five days.

Plaintiff did not submit any evidence within the allotted forty-five days, and the defendant now renews its motion. In opposition, plaintiff still has not

submitted any evidence tending to show that a real conflict of interest exists, but seeks instead to reargue the issues disposed of on defendant's prior motion. Plaintiff is not entitled to a "second bite of the apple," and should address its arguments to the Court of Appeals.

Accordingly, for the reasons stated in our opinion of May 31, 1979 in this case and in our opinion in Perez v. Arya National Shipping Line, Ltd., 468 F. Supp. 799 (S.D.N.Y. 1979), the defendant's motion for summary judgment dismissing this action is granted.

It is so ordered.

Dated: New York, New York
August 8, 1979

MORRIS E. LASKER
U.S.D.J.

OPINION OF HON. MORRIS E. LASKER.

(Printed in the Supplemental Appendix to Petition as Appendix G at Pages 1g to 17g.)

Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1977

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

against

OVE SKOU, R. A.,

Respondent.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MORRIS CIZNER
Attorney for Petitioners
160 Broadway
New York, N. Y. 10038

INDEX TO APPENDIX.

Page

Appendix C--Order of Affirmance by U. S. Court of Appeals for Reasons Stated in Rodriguez v. Compass Shipping Co. Ltd., et al. . . 1c

Appendix D--Order of Affirmance by U. S. Court of Appeals for Reasons Stated in Rodriguez v. Compass Shipping Co. Ltd., et al. . . 1d

Appendix E--Opinion of U. S. District Court, Southern District of New York, by Robert L. Carter, U.S.D.J. 1e

Appendix F--Opinion of U. S. District Court, Southern District of New York, by Morris E. Lasker, U.S.D.J. 1f

Appendix G--Opinion of U. S. District Court for the Southern District of New York, by Morris E. Lasker, U.S.D.J. 1g

APPENDIX C--ORDER OF AFFIRMANCE BY U. S. COURT OF APPEALS FOR REASONS STATED IN RODRIGUEZ v. COMPASS SHIPPING CO., LTD., ET AL.

United States Court of Appeals

SECOND CIRCUIT

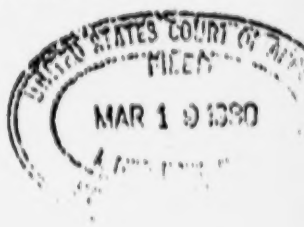
At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of March, one thousand nine hundred and eighty.

Present: HONORABLE STERRY R. WATERMAN,

HONORABLE LEONARD P. MOORE,

HONORABLE WALTER R. MANSFIELD,

Circuit Judges.



SRECKO BARULEC,

Plaintiff-Appellant,

-against-

OVE SKOU, R.A.,

Defendant-Appellee.

Docket No. 79-7630

The judgment of the district court is affirmed for the reasons stated in our opinion in the case of Frederico Rodriguez v. Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N., Docket No. 79-713 ___ F.2d ___.

Sterry R. Waterman, U.S.C.J.

Leonard P. Moore, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

APPENDIX D--ORDER OF AFFIRMANCE BY U. S. COURT OF APPEALS FOR REASONS STATED IN RODRIGUEZ v. COMPASS SHIPPING CO., LTD., ET AL.

United States Court of Appeals

SECOND CIRCUIT

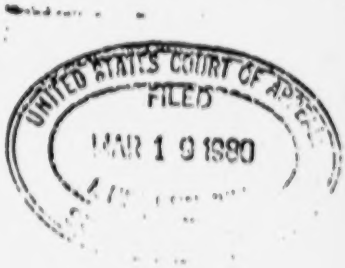
At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of March, one thousand nine hundred and eighty.

Present: HONORABLE STERRY R. WATERMAN,

HONORABLE LEONARD P. MOORE,

HONORABLE WALTER R. MANSFIELD,
Circuit Judges.

79-7632



LUIS PEREZ,

Plaintiff-Appellant,

-against-

ARYA NATIONAL SHIPPING LINE, LTD.,

Defendant-Appellee.

Docket No. 79-7632

The judgment of the district court is affirmed for the reasons stated in our opinion in the case of Frederico Rodriguez v. Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N., Docket No. 79-7132 ___ F.2d ___.

Sterry R. Waterman, U.S.C.J.

Leonard P. Moore, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

APPENDIX E--OPINION OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, BY ROBERT L. CARTER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERICO RODRIGUEZ,

Plaintiff,

- against -

77 Civ. 3378 (RLC)

#47598

COMPASS SHIPPING COMPANY LTD. and D. JAKARTA LLOYD P.N.,

Defendants.

APPEARANCES

ZIMMERMAN & ZIMMERMAN, ESQS.
160 Broadway
New York, New York
Attorneys for Plaintiff
Edward D. Lory, Esq.
Of Counsel

WALKER & CORSA, ESQS.
25 Broad Street
New York, New York
Attorneys for Defendants
Joseph T. Stearns, Esq.
Of Counsel

U.S. DISTRICT COURT FILED SEP 13 1978 S.D. OF N.Y.

CARTER, D. J.

O P I N I O N

Plaintiff is a longshoreman. On September 4, 1973, as an employee of the stevedoring company International Terminal Operating Co., Inc. ("International"), plaintiff was working in Hatch No. 2 on the S.S. South Breeze, docked in Brooklyn, New York, unloading a shipment of coffee. The S.S. South Breeze was then owned by defendant Compass Shipping Company ("Compass") and was being operated under a bareboat charter by defendant D. Jakarta Lloyd ("Jakarta"). According to the plaintiff, he injured himself when, in the course of leaving work for the day, he climbed up the ladder from Hatch No. 2 and, upon reaching the deck of the ship, put his foot into a hole above the ladder which descended into the adjacent Hatch No. 3.

In the present action, Compass moves to dismiss the action against it on the ground that an earlier suit between plaintiff and Compass concerning the same events was dismissed by Judge Bonsal of this court. In addition, both Compass and Jakarta move for dismissal on the ground that, under the facts of this case, plaintiff's claim for relief against the defendants was assigned to his employer, International, by virtue of the provisions of 33 U.S.C. § 933(b). Lastly, both defendants move for summary judgment under F.R.Civ.P. 56. For the reasons set forth below, the motion based on Judge Bonsal's order of dismissal is denied, determination of the motion based on 33 U.S.C. § 933(b) will await the completion of the discovery specified in this opinion, and the motion for summary judgment is denied.

Judge Bonsal's Order of Dismissal

On June 2, 1976, plaintiff filed a suit in this district concerning the alleged accident of September 4, 1973, and the action was assigned to Judge Bonsal. Only Compass, the shipowner, was named as a defendant. A pre-trial conference was held before the Judge on February 28, 1977, at which time Compass revealed to the court and plaintiff that when the events in question allegedly occurred, the S.S. South Breeze was under the exclusive control of Jakarta, who had chartered the vessel. Compass argued that under these circumstances, it was not a proper party-defendant on the theory that it could not possibly be liable for events which occurred when the vessel was under the dominion of another. According to the defendant, plaintiff agreed that Compass was improperly named as a defendant. In

any case, an order of discontinuance was signed at the conference. The order states simply that "it is ORDERED that the above entitled action be and hereby is discontinued without costs to either party," and is dated and signed by Judge Bonsal. Underneath that signature is the statement "I hereby consent to the entry of this proposed order," followed by the signature of the attorneys of both plaintiff and defendant. Handwritten across the bottom is "30 Day Order. Extended an additional 30 Days (3/28/77)." The apparent purpose of this order was to permit plaintiff time to confirm defendant's assertion that the vessel had been chartered to Jakarta, after which the action against Compass was to be discontinued. After the conference, plaintiff apparently reconsidered his position with regard to the scheduled discontinuance, for on March 18, 1977, he

moved to have the order of discontinuance vacated and for permission to add Jakarta as a defendant in the pending action. The motion seems to have been denied, for plaintiff does not now contest that his earlier action was dismissed by virtue of the February 28, 1977 order.

Without reference to statute, rule, precedent, or explanation, Compass claims that the present action against it is barred by Judge Bonsal's order of discontinuance. In like manner, plaintiff asserts that that order was "without prejudice." For reasons not alluded to in the papers before the court, plaintiff is correct.

Rule 41(a) of the Federal Rules of Civil Procedure provides that unless otherwise indicated in the dismissal, a voluntary dismissal of an action is without prejudice. This is so whether the dismissal is accomplished by plaintiff's

filing of a notice of dismissal before an answer or a motion for summary judgment is served (F.R.Civ.P. 41(a)(1)(i)), by stipulation among all parties (F.R.Civ.P. 41(a)(1)(ii)), or by order of the court (F.R.Civ.P. 41(a)(2)). The dismissal of plaintiff's earlier action was voluntary: plaintiff consented to it. The consequent effect of Judge Bonsal's order was that the dismissal it directed was without prejudice. That effect is not altered by the fact that subsequent to the signing of the order plaintiff changed his mind and decided he wished to preserve the action and add a new party-defendant. Because plaintiff consented to the dismissal at the time the order was signed, the automatic effect of the order was that the dismissal was without prejudice, and there is no indication that Judge Bonsal ever determined the merits of Compass' argu-

ment concerning its liability to plaintiff. It would be contrary to justice and good sense if the mere fact of plaintiff's later and strategically motivated opposition to dismissal mechanically transformed Judge Bonsal's order into an adjudication of the merits of plaintiff's claim against Compass. The present action against Compass is not barred by the discontinuance of plaintiff's earlier action.

Section 933(b)

Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("the Act"), a longshoreman who is injured in the course of his employment is entitled to compensation payments from his employer. The liability of the employer for this compensation is to the exclusion of all other liability of the employer, 33 U.S.C. § 905, but the injured

longshoreman retains the right to sue any other person who may be responsible for his injuries. 33 U.S.C. § 933(a). Section 933(b) provides, however, that

> "[a]cceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board [§ 921(b)] shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

It is defendants' contention that under the terms of this subsection, plaintiff no longer has any claim for relief against them.

Although the record does not present an overly detailed history of plaintiff's compensation claim, it is apparent that following his injury, he made a claim against his employer and that the claim caused some form of dispute requiring the attention of the Office of Workers' Com-

pensation Programs ("OWCP") of the United States Department of Labor, for on November 4, 1974, the adjudication of plaintiff's claim before that agency was settled. The settlement is embodied in an OWCP form and recites that "[w]e, the undersigned, having attended an informal conference, and having received a copy of the signed agreement, in this case on 11/4/74, agree, by the issuance of a Compensation Order, to the following disposition." The settlement then indicates the specifics of that disposition,[1] and concludes: "The employer-carrier shall make payment promptly following the conference, without regard to the receipt of the formal compensation order, in accordance with Section 702.315(a) of the Regulations," presumably meaning 20 C.F.R. § 702.315(a). The document is signed by the plaintiff, his representative, a rep-

resentative of the employer and the "claims examiner." The "informal conference" from which the settlement arose is the agency's preferred means of disposing of disputes concerning compensation claims. 20 C.F.R. §§ 702.301, 702.311. Section 702.315(a), to which the settlement refers, directs in part that

> "[f]ollowing an informal conference at which agreement is reached on all issues, the deputy commissioner shall embody the agreement in a formal compensation order, to be filed and mailed .... [W]hen the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, ... such action shall be commenced immediately upon becoming aware of the agreement, and without regard to the receipt of the formal compensation order."

Despite, however, the implicit assumption of the settlement and the explicit command of the regulation, no "formal compensation order" was ever issued.[2]

Plaintiff does not dispute that he received compensation for his injuries from

his employer, or that he instituted suit against the defendants more than six months after the settlement agreement or his receipt of the compensation. What is contested is whether the settlement constituted "an award in a compensation order filed by the deputy commissioner ...."[3] For, as the statute makes clear, mere acceptance of compensation, absent an "award", does not effect a statutory assignment of the injured party's claim.[4] E.g., Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir.), cert. denied, 326 U.S. 743 (1945); Tartaglio v. Cunard White Star, 56 F. Supp. 55 (S.D.N.Y. 1944) and cases cited therein. See also American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 (1946); Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097, 1101-2 (4th Cir. 1977).

Plaintiff's initial argument in this regard is that the settlement agreement does not satisfy the statutory requisites of an "award" because it was signed only by a claims examiner, and not by a Deputy Commissioner. This position is not without some support, as several cases have held that a document signed by a claims examiner is not a § 933(b) award. Grasso v. Lorentzen, supra, 149 F.2d 127, 129, aff'g 56 F. Supp. 51 (S.D.N.Y. 1944); Roeben v. United States, 113 F. Supp. 732 (D.N.J. 1953); Romano v. United States, 90 F. Supp. 15 (S.D.N.Y. 1950); Sessa v. Weeks Stevedoring Co., 56 F. Supp. 50 (S.D.N.Y. 1943). This literal reading of the statute seems to have been motivated by concern about the harsh consequences for the injured employee of finding that an assignment of his claim has occurred.

See Sessa v. Weeks Stevedoring Co., supra, 56 F. Supp. 50, 51.

However well-meaning the rule adopted by these decisions may be, it is at odds with the way in which administrative agencies perform their functions and the legislative purpose underlying the adoption of the "under an award" requirement in 1938, see note 4, supra. Accordingly, we refuse to apply such a rule here. By regulation, the deputy commissioner is empowered to delegate his duties with regard to disputed compensation claims, and the delagee of these duties is fully authorized to "perform the duties set forth below assigned to the deputy commissioner," 20 C.F.R. § 702.312. There is no reason to believe that the claims examiner who presided over the informal conference in this case was not then the deputy commissioner's delagee. Nor is there reason to believe

that this normal principle of administrative law is not operable in the context of a § 933(b) award proceeding. The ordering of compensation by a claims examiner or any other delagee of the deputy commissioner, as well as by a deputy commissioner himself, fully satisfies the purpose of the award requirement, which is solely to insure the injured person an opportunity to consider fully the consequences under § 933(b) of accepting compensation before those consequences are incurred. See H.R. Rep. No. 1945, 75th Cong., 3 Sess. (1938), quoted in Iaria v. Silver Line, Ltd., 56 F. Supp. 42, 44 (S.D.N.Y. 1943), and Cupo v. Isthmian S.S. Co., 56 F. Supp. 45, 47 (S.D.N.Y. 1941). No statutory purpose is furthered by requiring the endorsement of an actual deputy commissioner on an award.

Plaintiff's second contention is that the settlement agreement is not a § 933(b) compensation order because it is not a "formal order." It is now long settled that a "formal" order is not a necessity; an informal "equivalent" of an order is sufficient. Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (2d Cir. 1941). See Liberty Mutual Insurance Co. v. Ameta & Co., supra, 564 F.2d 1097, 1101-03;[5] Grasso v. Lorentzen, supra, 149 F.2d 127, 129. Moreover, it is manifest that the settlement agreement is a compensation order for all intents and purposes. It is apparent from the agreement itself that the parties were determining the terms of a compensation order, which order, it was anticipated, was to issue shortly thereafter. Upon signing the agreement, it was the duty of the employer to begin making compensation payments immediately, and it

was the duty of OWCP to memoralize the agreement in a more formal document. While the agency's failure to perform this duty may have consequences for OWCP's internal record-keeping, it clearly was of no significance to the understanding or actions of the parties. There is thus no reason why this technical administrative lapse should be permitted to control the legal significance of the settlement agreement. That agreement fulfills the purpose of the award requirement, and is a compensation order within the meaning of § 933(b).

Relying on Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965), plaintiff argues that notwithstanding the fact of receipt of compensation under an award, an injured person may still bring an action against the third-party tortfeasor "whenever it is evident that the employer-assignee, for whatever reason,

does not intend to bring suit." Potomac Electric Power Co. v. Wynn, supra, 343 F.2d at 298. Plaintiff contends that by its inaction, the employer-assignee waives "the protection offered by statutory assignment." Affirmation in Opposition, p. 4. Though this position has strong appeal in terms of policy considerations, it must be rejected.

By virtue of the assignment which it decrees, § 933(b) places the claim for relief against a third party in the hands of the employer who provides its injured employee with compensation. This device serves two purposes. First, it enables the compensating employer to control directly the potential suit by which the employer may recoup from the alleged third-party tortfeasor the sums expended as compensation payments. Second, it permits the interested party with the

greater financial and legal resources to prosecute the claim for the benefit of both the employer and the employee.[6] Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525, 531 (1956). The assignment device also has a significant drawback: in the apparently frequent case where the employer-assignee does not, in fact, institute an action, the injured employee must helplessly watch "his" claim for relief languish, to the benefit of no one but the alleged tortfeasor.

It may be argued that the purposes of the § 933(b) assignment could also have been satisfied and this drawback avoided if Congress has eschewed the concept of "assignment." Congress could have, and perhaps should have, directed that after the receipt of compensation under an award, both the employee and the employer would have the right to prosecute the claim

against the third party. In that case, each party would be in a position to protect its own interests, by bringing suit if it so wished, but if it did not, the rights of the other party would not thereby be foreclosed. Indeed, it would not be inconsistent with the purposes of the section to interpret the statute in this manner. But Congress did not choose that route; it directs instead that the claim be assigned from one party to another. And, with one exception, every relevant case that research has revealed has read § 933(b) literally and given the assignment notion its traditional meaning. For example, the Second Circuit has twice upheld the dismissal of complaints by injured employees on the ground that, by virtue of the statutory assignment, the claim was no longer theirs to prosecute. Sabol v. Merritt Chapman & Scott Corp., 241 F.2d 765 (1957);

Toomey v. Waterman S.S. Corp., supra, 123 F.2d 718. The Supreme Court has given the statute the same reading, describing § 933(b) as "giving the assignee exclusive control over the right of action." Czaplicki v. The S.S. Hoegh Silvercloud, supra, 351 U.S. at 531. See also H.R. Rep. No. 1945, 75th Cong., 3d Sess. (1938), supra, accompanying the 1938 amendments to the Act, discussed in note 4, supra (acceptance of compensation "result[s in the] loss of right to bring suit in damages against the third party"); Di Somma v. N.V. Koninklyke Nederlandsche Stoomboot, 188 F. Supp. 292, 294 (S.D.N.Y. 1960) (van Pelt Bryan, J.); Currant v. Eastern S.S. Lines, Inc., 77 F. Supp. 9 (D. Mass.), aff'd on the opinion below, 170 F.2d 148 (1st Cir. 1948). With the exception of the decision of the Court of Appeals for the District of Columbia Circuit in Potomac Electric

Power Co. v. Wynn, supra, the courts have universally construed § 933(b) to mean that, in the absence of special circumstances discussed below, after the assignment, the employer-assignee alone has the right to bring suit.

Against this array of authority stands Potomac Electric which held that the employee may bring a suit whenever it is clear that the employer, for whatever reason, will not. This view has not been adopted by subsequent decisions in other jurisdictions. See McClendon v. Charente Steamship Co., 348 F.2d 298, 303 (5th Cir. 1965): Bandy v. Bank Line Ltd., 442 F. Supp. 882, 886 (E.D. Va. 1977) (Potomac Electric rule rejected "as entirely inconsistent with the plain language of 33 U.S.C. § 933(b)"). I must also decline to follow it. The Potomac Electric court had two grounds of decision. It pointed out that

precluding the injured employee from suing himself when the employer does not wish to proceed on the claim would serve no apparent statutory purpose. As indicated above, I agree, but, as also indicated, the uniform construction that has been given the statute and the rule that Congress apparently intended to adopt requires precisely that result. The court also relied on certain amendments to the Act made in 1959,[7] which, it argued, evidenced a Congressional desire "to facilitate the employee's recovery against the third party." 343 F.2d at 298. It would be inconsistent with this purpose, the court argued, to place unpurposeful barriers in the path of the employee who seeks to vindicate his claim. With all respect, however, I believe that the conclusion drawn by the court is broader than warranted. Whatever other benefits they may have bestowed upon em-

ployees, the 1959 amendments did not alter the underlying structure of § 933(b); both before and after 1959, the occurrence of certain events constitutes an "assignment" of the claim from employee to employer. Nor is there any reason to believe that Congress meant, obliquely, to change what had theretofore been thought to be the meaning of that term.

Although this court is not free to accept the broad argument of Potomac Electric, there is in fact a more limited, but well developed, exception to the rule that the employee cannot sue once his claim has been assigned to the employer. In Czaplicki v. The S.S. Hoegh Silvercloud, supra, the Court determined that, notwithstanding the fact of the assignment, the employee can still bring suit if, because of a conflict of interest between the assignee and the employee, the assignee did not

press the claim. The conflict in Czaplicki was of a particular and infrequent sort: the employer's compensation insurance carrier (which, as subrogee of the employer's rights on the assigned claim, § 933(h), was the proper party to bring suit on those rights, Czaplicki, supra, 351 U.S. at 529) was also the liability insurer for one of the third parties subject to suit. As a result, the employee's "rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced," Czaplicki, supra, 351 U.S. at 530; thus, an action by the employer's subrogee would have been, in effect, an action against itself. Under those circumstances, the employee was permitted to sue on the claim that was no longer technically his.

Although the Court in Czaplicki appeared to base its decision on the unique facts of that case, the "conflict of interest" exception to § 933(b) it announced was quickly and widely expanded by the lower courts. E.g., McClendon v. Charente Steamship Co., supra; Johnson v. Sword Line, Inc., 257 F.2d 541 (3d Cir. 1958); Allen v. United States, 235 F. Supp. 950 (N.D. Cal. 1963), aff'd on other grounds, 338 F.2d 160 (9th Cir. 1964), cert. denied, 380 U.S. 961 (1965); DiSomma v. N.V. Koninklyke Nederlandsche Stoomboot, supra.[8] This expansion was primarily based upon the realization that the doctrine of Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956), created an inherent conflict of interest in many situations in which the employer was a stevedoring company and the third party subject to suit was the owner of the ves-

sel upon which the injury occurred. In Ryan, the Court determined that

> "a vessel owner found liable to a longshoreman injured as a result of the unseaworthy condition of the vessel was entitled to recover damages, when appropriate, from the stevedore under a theory that by a breach of the warranty of workmanlike service the stevedore or its employees caused or contributed to cause the condition on the vessel which gave rise to the longshoreman's recovery."

Bandy v. Bank Line Ltd., supra, 442 F. Supp. at 884. The practical effect of this doctrine was that "the assignee employer [was put] in a position where by suing the vessel owner to recoup its compensation payments it exposed itself to possible claim for indemnification of a larger judgment against the vessel owner." Ibid. Under these circumstances, an employer was extremely unlikely to press the claim of its employee.

In 1972, the Ryan doctrine was legislatively overruled; an employer is no

longer liable to a vessel owner for any damages recovered by an employee in a third party action. 33 U.S.C. § 905(b). The present question is thus the current state of the conflict of interest exception after the 1972 amendment to the Act.

This issue has been well and extensively analyzed by Judge Clarke in Bandy v. Bank Line Ltd., supra, and I am in basic accord with his conclusion. Although the grounds of decision of many of the post-Czaplicki cases has been severely undercut by the 1972 amendments, which eliminated a specific potential conflict, these changes do not affect the broader principle which underlies both Czaplicki and its progeny: the fact of a statutory assignment should not prevent the employee from doing so. Nor is there any reason to limit application of the Czaplicki principle to the particular facts

of that case.[9] Consequently, if plaintiff's employer-assignee suffered under the burdens of a conflict of interest as the holder of plaintiff's claim, defendants' motion to dismiss under § 933(b) must be denied.

To date, the parties have not addressed themselves to the conflict of interest issue. It is thus not possible to resolve this question on the present record. The parties will therefore be granted an opportunity, if they so wish it, to undertake discovery on this issue, to be completed within 60 days of the date of this opinion. Plaintiff will bear the burden of persuasion on the conflict issue when defendant's motion to dismiss is ultimately decided. Bandy v. Bank Line Ltd., supra, 442 F. Supp. at 886-87.[10]

Summary Judgment

Although neither side has submitted a statement of material facts which are allegedly disputed or allegedly not in dispute, as required by Rule 9(g) of the General Rules of this court, the circumstances surrounding plaintiff's accident are relatively clear from his deposition testimony. According to plaintiff, on the day in question, he was working as a longshoreman in the lower hold of No. 2 Hatch. Access to the hold was by way of a vertical ladder attached to the bulkhead separating Hatch No. 2 from Hatch No. 3. As I understand it, the ladder leads from the floor of the hold to a small hole in the main deck in an area enclosed by a small structure called the masthouse. Also in the masthouse, and apparently within a foot or two of the hole for the ladder from Hatch No. 2, is the

hole for the ladder for Hatch No. 3. At the end of the work day, plaintiff and his co-workers climbed up the ladder. As plaintiff emerged from the hole into the masthouse, he grabbed onto a bar attached to a wall and put his foot on the deck. He placed his left foot, however, in the hole for the No. 3 Hatch ladder; the resulting jerk injured him. It is plaintiff's contention that defendants were negligent with regard to his safety in that the lighting in the masthouse was dangerously inadequate and that the arrangement of the manholes in the masthouse was hazardous.

At this particular moment, the law in this circuit regarding the respective responsibilities of the vessel owner/charterer and the stevedoring company for the safety of the longshoreman is unsettled. Compare Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir. 1978) with Canizzo

v. Farrell Lines, Inc., No. 77-7292 (2d Cir. June 2, 1978) and Lopez v. A/S D/S Svendborg and D/S of 1912 A/S, No. 78-7046 (2d Cir. July 24, 1978). But whatever the appropriate legal standard may be, summary judgment cannot be granted in this case because there are material issues of fact which are presently unresolved.

With regard to plaintiff's contention concerning the lighting in the masthouse, defendants argue, first, that "this court might safely conclude" there was sufficient natural lighting in the masthouse at the time of the accident. I cannot accept this invitation, for the record at present is skimpy, and the state of the lighting at any one place and time and its "sufficiency" in terms of personal safety are quintessentially issues of fact. Second, relying on Cox v. Flota Mercante Grancolombiana, S.A., supra, defendants

argue that the responsibility for assuring the longshoremen adequate lighting in the masthouse was upon the stevedore and not them. But resolution of this contention, too, requires a factual inquiry. Even under the Cox standard, the division of responsibility between stevedore and owner depends on the facts of each case, and the present record in this one reveals too little to permit me to absolve the vessel owner and charter of any responsibility to the longshoremen for the lighting in the masthouse.[11]

For similar reasons, summary judgment cannot be granted for defendants on plaintiff's argument regarding the arrangement of the manholes in the masthouse. Defendants' contention here is that there could be no finding of negligence since, as plaintiff stated at his deposition, the layout in the masthouse was not unusual.

But it is a commonplace that adherence to the usual practice of an industry, by itself, is not a complete defense to a charge of negligence. See, e.g., City of New York v. McAllister Brothers, Inc., 299 F.2d 227, 228 (2d Cir. 1962); Kane v. Branch Motor Express Co., 290 F.2d 503, 507 (2d Cir. 1961); Gulisano v. American Export Lines, Inc., 212 F. Supp. 809, 811 (S.D.N.Y. 1962) (Cashin, J.). Whether a given practice is negligent is to be determined by a jury, not by the industry which practices it.

Conclusion

The motion for summary judgment is denied. The motion to dismiss based on an earlier order of dismissal by Judge Bonsal is also denied. Decision on the motion to dismiss based on 33 U.S.C. § 933(b) is reserved, pending discovery,

to be completed within 60 days of this opinion.

IT IS SO ORDERED.

Dated: New York, New York
September 12, 1978

ROBERT L. CARTER
U.S.D.J.

FOOTNOTES

1. The total agreed-upon compensation was $3,610.21, from which was subtracted the sum which had been previously paid and a sum for the "approved fee," leaving a balance due to plaintiff of $2,623.03.

2. At oral argument on the instant motions, a copy of a letter from an Acting Deputy Commissioner of OWCP to the attorneys who represented plaintiff before OWCP, dated May 22, 1978, was submitted to the court. The letter was in response to an inquiry whether the settlement agreement "constitutes a Formal Order." OWCP's response was that "[r]eview of our file shows ... that the parties had stipulated to the issues on the claim. The self-insured employer voluntarily made payment of the compensation in accordance with the stipulations. To the present, a Formal Order has not been issued."

3. In addition, plaintiff argues that the proper interpretation of § 933(b) is that the injured person may bring suit, notwithstanding the statutory assignment, whenever it is evident that the assignee does not itself intend to bring suit. This contention is discussed in detail below.

   Plaintiff also asserts, in passing, that "33 U.S.C. 933(b) was not designed to protect third parties such as the defendants herein from suit." I presume that the argument hinted at here is that third parties do not have

standing to assert the assignment of the claim from the injured person to his employer. No authority is cited in support of this proposition, nor has research uncovered any, other than an intimation to that effect contained in Roeben v. United States, 113 F. Supp. 732, 735 (D.N.J. 1953). Indeed, several courts have sustained the § 933(b) assignment of claim defense even though it was raised by the non-assignee "third party." Sabol v. Merrit Chapman & Scott Corp., 241 F.2d 765 (2d Cir. 1957); Currant v. Eastern S.S. Lines, Inc., 77 F. Supp. 9 (D. Mass.), aff'd on the opinion below, 170 F.2d 148 (1st Cir. 1948). See also DiSomma v. N.V. Koninklyke Nederlandsche Stoomboot, 188 F. Supp. 292, 294 (S.D.N.Y. 1960) (van Pelt Bryan, J.) (dicta). Moreover, in the numerous other cases in which a non-assignee defendant has asserted the § 933(b) assignment as a defense, there is no indication that the non-assignee lacked standing to assert the assignment. See, e.g., Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525 (1956); McLendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965); Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965); Johnson v. Sword Line, Inc., 257 F.2d 541 (3d Cir. 1958); Bandy v. Bank Line Ltd., 442 F. Supp. 882 (E.D. Va. 1977). Almost every opinion that has touched upon the assignment question has assumed that standing to assert the assignment was not limited to the assignee. Plaintiff's contention in this regard must be rejected.

4. The reverse was true before 1938. Until the statute was amended in that year, the simple acceptance of compensation did create an assignment of the claim. See American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 n. 18 (1946).

5. I should note, however, that I cannot agree with the conclusion of Liberty Mutual that the events which occurred in that case constituted a statutory award.

6. If the employer's suit is successful, it must, after the deduction of its expenses and compensation payments, pay over to the employee 80% of the remaining recovery from the third party. 33 U.S.C. § 933(e).

7. At that time, the Act was amended to permit the employee to sue the third party even though he has received compensation under an award, as long as suit is instituted within six months of the award. Congress thereby gave the injured employee full opportunity for a limited time to pursue both the compensation and law suit remedies. Further, the Act was changed to permit the employer-assignee who does bring suit to retain 20% of any recovery from the third party in excess of the employer's expenses and compensation payments. See note 6, supra. This latter change was made to provide an incentive to the employer to prosecute the assigned claim with vigor.

8. For a thorough recounting of the genesis and evolution of the conflict of interest exception, see Bandy v. Bank Line Ltd., supra, note 3.

9. It may be, for example, that plaintiff's employer has been dissuaded from pressing the claim in favor of its employee out of fear of antagonizing its customer, the vessel charterer. See Valentino v. Rickners Rhederei, G.M.B.H., S.S. Etha, 552 F.2d 466, 469 (2d Cir. 1977).

10. The burden is properly placed on plaintiff because the issue is the applicability of an exception to a general rule that would operate, absent the exception, to bar plaintiff's suit, and there appears to be no reason to presume, after the demise of the Ryan doctrine, that the exception should be applied.

11. In any case, as indicated above, it is presently unclear whether the Cox decision is still the law of this circuit.

APPENDIX F--OPINION OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, BY MORRIS E. LASKER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

LUIS PEREZ,

Plaintiff,

-against- 76 Civ. 3009

ARYA NATIONAL SHIPPING LINE, LTD.,

Defendant.
----------X

APPEARANCES:

ZIMMERMAN & ZIMMERMAN, ESQS.
160 Broadway
New York, New York 10038
Attorneys for Plaintiff
Of Counsel: MORRIS CIZNER, ESQ.

WALKER & CORSA, ESQS.
25 Broad Street
New York, New York 10004
Attorneys for Defendant
Of Counsel: JOSEPH T. STEARNS, ESQ.

LASKER D.J.

Luis Perez, a longshoreman, was injured in August, 1973, while working aboard a vessel owned by the defendant. In March, 1975, the Workmen's Compensation Board entered an order awarding Perez compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (LHWCA). Some fifteen months after the Board's action, Perez commenced this action against the shipowner, seeking damages for the personal injuries he suffered as a result of his accident.

I.

As amended in 1959, section 33 (b) of the LWHCA provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless

> such person shall commence an action against such third person within six months of the award."

33 U.S.C. § 933(b). The shipowner moves to dismiss the complaint on the grounds that since Perez did not commence this action within six months of the Board's award, his cause of action was assigned to his employer, and he cannot maintain this suit. In response Perez cites Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956), which carved an exception to the mandate of section 33(b). The principal question presented here is not whether the exception remains viable, but who bears the burden of proving whether it applies or not in a given case.

Despite the assignment provided for by section 33(b), an employee retains an interest in the cause of action even after he loses the right to sue on it, since section 33(e) of the LHWCA, 33 U.S.C. § 933(e),

apportions any recovery secured by the employer between it and the employee. Section 33(e) allows the employer to keep out of any recovery it makes, the expenses it incurred in pressing the suit, expenses for medical care provided the employee, amounts paid or payable to the employee as compensation, and (as a further incentive to pursue its employee's claims vigorously) twenty percent of the balance. The remaining eighty percent goes to the employee.

Until the amendment of the LWHCA in 1959, the employee lost his right to sue immediately upon accepting compensation under an award, rather than six months later. See Pub. L. No. 86-171, 73 Stat. 391 (1959). This was the situation when the Supreme Court rendered its decision in Czaplicki. Noting that "[i]n giving the assignee exclusive control over the right of action...the statute presupposes

that the assignee's interests will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery," the Court construed section 33(b) as allowing an employee to sue in his own name "where there is a conflict of interest [and] the inaction of the assignee operates to defeat the employee's interest in any possible recovery." Czaplicki v. The Hoegh Silvercloud, 35 U.S. 525, 531 (1956).

This "conflict of interest" exception to the mandate of section 33(b) was broadened considerably by lower courts in response to Ryan Stevedoring Co. v. Pan-Alantic Steamship Corp., 350 U.S. 124 (1956). In Ryan, the Court held that a stevedore was liable to a shipowner for any portion of a recovery against the shipowner

by the stevedore's employee which was attributable to the stevedore's breach of its warranty of workmanlike performance. Id. at 132-34. As a consequence of this holding, stevedores were understandably reluctant to sue shipowners on behalf of their employees. The most that the stevedore could hope to recover would be its costs associated with the employee's injury, plus twenty percent of any remaining recovery. In instituting suit, however, the employer opened itself up to the possibility that it would have to indemnify its opponent for part or all of that recovery. The greater the stevedore's recovery, the greater its potential liability to the very party from whom it recovered. Recognizing that "[t]his conflict may well prevent the prosecution of the assignee's action with the vigor and zeal which would result in the maximum recovery for the employee," DiSomma v. N.V. Koninklyke

Nederlandsche Stoomboot, 188 F.Supp. 292, 296 (S.D.N.Y. 1960), many courts readily ruled that section 33(b) did not preclude an employee from suing on his own behalf. E.g., Potomac Electric Power Co. v. Wynn, 343 F.2d 295, 297 (D.C. Cir. 1965); Johnson v. Sword Line, Inc., 257 F.2d 541, 544-46 (3d Cir. 1958); Allen v. United States, 235 F. Supp. 950, 954 (N.D. Calif. 1963), aff'd 338 F.2d 160 (9th Cir. 1964), cert. denied, 380 U.S. 961 (1965); DiSomma, supra, 188 F.Supp. at 297.

The defendant shipowner does not argue that the conflict of interest exception is no longer viable. The question presented, rather, is who bears the burden of proving that a conflict does or does not exist. Perez relies on Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965). There the court held that "the employee may bring suit against a third party whenever

it is evident that the employer-assignee, for whatever reason, does not intend to bring suit." Id. at 298. An alternative approach is that announced in Bandy v. Bank Line Ltd., 442 F.Supp. 882 (E.D. Va. 1977), and followed in Rodriguez v. Compass Shipping Co., No. 77-3378 (S.D.N.Y. September 12, 1978). These cases, on which the defendant relies, hold that the employee bears the burden of proving that a conflict exists. 442 F.Supp. at 886-87; No. 77-3378, slip op. at 14. For several reasons, we find the latter alternative to be the sounder position.

First, the employee seeks the advantage of an exception to a statute which on its face clearly deprives him of the right to sue. In such circumstances, it is appropriate to require the employee to demonstrate that the exception would be appropriate. Second, Perez could have filed suit

within six months of the compensation award. He failed to do so, and now seeks, in effect, to extend his time in which to sue. When the conflict of interest exception originated in 1956, an employee who accepted compensation under an award immediately lost his opportunity to sue. The 1959 amendments to the LHWCA diminished the need for an exception to section 33(b): the employee can now avoid the adverse effects of any possible conflict of interest simply by filing suit within six months of the award. An employee who fails to do so should shoulder the burden of proving that he continues nonetheless to have a right to sue. Third, the 1972 amendments to the Act legislatively overruled the Ryan docutrine. See Pub. L. No. 92-576, § 18(a), 86 Stat. 1251 (1972) (codified as 33 U.S.C. § 905[b]). The solicitude towards employees reflected in the liberal application of the conflict of interest exception in cases such as Potomac

Electric Power Co. v. Wynn can be attributed largely to the unavoidable conflict of interest created by that doctrine. In view of the 1972 amendments, such solicitude is no longer warranted. Finally, the 1972 amendments substantially increased the compensation payable to an injured longshoreman. Id. § 5(a) (codified at 33 U.S.C. § 906). The compensation now available to a longshoreman is more nearly commensurate with his actual damages, and consequently it is appropriate to require the longshoreman to demonstrate his right to sue after he has already received compensation.

In sum, the employee bears the burden of showing that his employer's interests conflict with his own, and that out of self interest his employer will not properly press the claim. The hearsay affidavit submitted by Perez in an attempt to meet this burden cannot be accepted. See Fed.

R. Civ. P. 56(e). However, Perez is granted forty-five days from the filing of this memorandum within which to submit competent evidence establishing that a conflict of interests exists.

II.

Perez also claims that "[t]o grant shipowner's motion to dismiss would be against public policy, in violation of the intent of Congress and the purposes of Section 933 of the Longshoremen's and Harbor Workers' Act as amended."

The LHWCA is intended to provide covered employees the benefits of workmen's compensation, without depriving them of the right to be compensated for their injuries by negligent third parties, or eliminating the incentive for third parties to provide longshoremen a safe place to work. To prevent indirect recovery form the employer, the

1972 amendments to the LHWCA prohibit the employer from indemnifying third parties for damages recovered from them by employees. This ensures that the employer's only liability will be for workmen's compensation, and that it will not otherwise be liable in damages for injuries to its employees.

Perez argues that assignment of the employee's claims against third parties to the employer contravenes the purposes of the LHWCA because it deprives the employee of his right to compensation from negligent third parties and eliminates an incentive for third parties to avoid negligent conduct. Moreover, Perez contends that the employer, by foregoing a possible recovery against a third party, indirectly "indemnifies" the third party, and, citing Bloomer v. Liberty Mutual Insurance Co., 586 F2d 908 (2d Cir. 1978) and Cella Partenveederei M.S. Ravenna,

529 F.2d 15 (1st Cir. 1975), neglects its "obligation" under the LHWCA to husband its resources for payment of increased compensation benefits.

Whatever first-blush appeal these arguments may have, on reflection they are unpersuasive. First, whatever the consequences of a failure to sue, an employee who fails to sue within six months of accepting compensation under an award of the Workmen's Compensation Board is as responsible for that failure as an employer who neglects, for whatever reason, to pursue an assigned claim. Second, an employer's failure to recover from a third party for the third party's negligence is not the same thing as an employer's indemnifying a third party on the basis of the employer's own negligence or breach of warranty. The 1972 amendments were intended to ensure that employers would not be liable, not that third parties

would be. Finally, there is no reason to assume that an employer's failure to sue necessarily reflects a breach of an obligation, if any exists, to husband its resources. On the contrary, such a failure may mean merely that the chances of winning the case are too remote to warrant suit.

The defendant's motion to dismiss the action is denied, without prejudice to renewal after forty-five days.

It is so ordered.

DATED: New York, New York
April 17, 1979

MORRIS E. LASKER
U.S.D.J.

APPENDIX G--OPINION OF U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, BY MORRIS E. LASKER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

SRECKO BARULEC,

Plaintiff,

-against-

78 Civ. 786(MEL)

OVE SKOU R.A.,

Defendant.
----------X

APPEARANCES:

ZIMMERMAN & ZIMMERMAN, ESQS.
160 Broadway
New York, New York 10038
Attorneys for Plaintiff
Of Counsel: MORRIS CIZNER, ESQ.

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
One State Street Plaza
New York, New York 10004
Attorneys for Defendant
Of Counsel: RICHARD K. MATANLE, II, ESQ.
JOHN TORIELLO, ESQ.

LASKER, D.J.

The plaintiff, Srecko Barulec, a longshoreman, was injured on January 6, 1975, while assisting in the discharge of the M/S Mette Skou, owned by the defendant, Ove Skou R.A. Barulec received workmen's compensation from his employer until March 14th, when the employer determined that Barulec had fully recovered from his injuries. On March 25, 1975, Barulec filed a claim for additional compensation under the Longshoremen's and Harbor Workers' Compensation Act (LWHCA), 33 U.S.C. §§ 901-950, with the Office of Workmen's Compensation Programs (OWCP). Pursuant to the regulations implementing the LWHCA, a claims examiner convened an informal conference. See 20 C.F.R. §§ 702.311-.314 (1976). At the conference, Barulec and his employer reached an agreement settling Barulec's claim, and the agreement was memorialized

in a "Memorandum of Informal Conference" prepared and signed by the claims examiner.

A year later, on February 22, 1978, Barulec commenced this action against the shipowner, alleging that his injuries were caused by the shipowner's negligence, and seeking damages.

The shipowner moves to amend its answer to assert as a defense that any claim that Barulec may have had against it has been assigned to his employer pursuant to section 33(b) of the LHWCA, 33 U.S.C. § 933(b), because Barulec filed suit more than six months after accepting compensation "under an award in a compensation order filed by the deputy commissioner."[1] Id. Since leave to amend pleadings "shall be freely given when justice so requires," Fed. R. Civ. P. 12 (a), and shipowner's counsel filed this motion eleven days after receiving the records of Barulec's compen-

sation proceedings which provide the basis for the new defense sought to be asserted, the motion for leave to amend the answer is granted.

In the event leave is granted, the shipowner moves for summary judgment dismissing the complaint on the merits of the newly asserted defense. Barulec counters that even if the shipowner is permitted to interpose a defense of assignment, the assignment may not be effective in this case under the rule of Czaplicki v. The Hoegh Silvercloud, 351 U.S. 527 (1956).

Under the LHWCA as originally enacted in 1927,[2] an injured employee who accepted workmen's compensation from his employer lost his right to sue third parties, which was assigned by operation of law to his employer. In 1938 the Act was amended to provide that the employee's right to sue is assigned to his employer only when the employee accepts compensation "under an

award in a compensation order filed by the deputy commissioner or [Benefits Review] Board." Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164.[3]

> "As a result of the amendment there must now be some official action by the Deputy Commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against a third party."

Grasso v. Lorentzen, 149 F.2d 127, 128-29 (2d Cir.) cert. denied, 326 U.S. 743 (1945). The shipowner contends that the intercession of the Office of Workmen's Compensation Programs, and the preparation of a "Memorandum of Informal Conference" embodying the terms of the settlement reached following the intercession, constitute sufficient "official action by the Deputy Commissioner" to amount to an award in a compensation order and consequently to establish an assignment of Barulec's claims, barring him from maintaining this action in

his own name.

Because the regulations implementing the LHWCA stress informal resolution of compensation disputes, see 20 C.F.R. § 702.301 (a), the OWCP often does not in fact issue such orders, see Intercounty Construction Corp. v. Walter, 422 U.S. 1, 4-5 & 4 n.4 (1975), even though the LHWCA contemplates, 33 U.S.C. § 919 (c), and the regulations effective at the time Barulec's claim was processed require, 20 C.F.R. §§ 702,315(a), .348 (1976),[4] that every claim submitted to the OWCP culminate in a formal order rejecting the claim or making an award on it. However, the absence of a formal order does not bar an assignment of an employee's claim under section 33(b). It has long been the law that informal official action, "equivalent to an order," suffices to trigger an assignment. Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (2d Cir. 1941); accord, Liberty Mutual Insurance Co. v. Ameta & Co.,

564 F.2d 1097, 1102-03 (4th Cir. 1977); Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir.), cert. denied, 326 U.S. 743 (1945); Rodriguez v. Compass Shipping Co., 456 F. Supp. 1014, 1020 (S.D.N.Y. 1978); Hernandez v. Costa Armatori, S.P.A., "Pia Costa," No. 76 Civ. 2300, slip op. at 3-5 (E.D.N.Y. March 30, 1979).

The question then, is whether the actions of the OWCP relating to Barulec's claim were "equivalent to an order" establishing an award of compensation. Barulec argues that they were not, because the deputy commissioner himself took no part in, and in no way ratified, those actions. Several early cases, which held that only action by the deputy commissioner himself can amount to a compensation order (formal or informal), support his argument. E.g., Grasso v. Lorentzen, 56 F.Supp, 51, 54 (S.D.N.Y. 1944), aff'd, 149 F.2d 127 (2d Cir.), cert. denied,

326 U.S. 743 (1945); Sessa v. Weeks Stevedoring Co., 56 F.Supp. 50, 51 (S.D.N.Y. 1943); see Lumber Mutual Casualty Insurance Co. v. Locke, 60 F.2d 35, 37 (2d Cir. 1932). For instance, in Sessa v. Weeks Stevedoring Co., supra, on facts nearly identical to those of the present case, the court held that an employee's right to sue third parties was not assigned under section 33(b) where a conference was held before a claims examiner and the disposition to the employee's claims at the conference recorded in a "Memorandum of Conference" prepared by the claims examiner. The court stated that "the determination or award, even though informal in character, [was] made by a claims examiner and there seems to be no authority in the statute for the award made by claims examiners." 56 F.Supp. at 51.

However, Sessa and the other cases relied on by Barulec were premised on out-

dated administrative practice. Modern practice, as indicated below, authorizes considerably greater delegation of authority than was permissible at the time those cases were decided. See Rodriguez v. Compass Shipping Co., 456 F.Supp. 1014, 1019 (S.D. N.Y. 1978); 1 K. Davis, Administrative Law Treatise § 3:17 (2d ed, 1978). The OWCP has formally adopted procedures for processing compensation claims that provide for the delegation of many of the deputy commissioner's statutory functions to others in the agency. The regulations in effect when Barulec's claim was processed provide:

> "Informal conferences shall be called by the deputy commissioner or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned the designee shall perform the duties set forth below assigned to the deputy commissioner."

20 C.F.R. § 702.312 (1976). Among the duties "set forth below" is that of preparing com-

pensation orders when claims are settled at the conference.

> "Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall embody the agreement in a formal compensation order...."

Id. § 792,315. Whatever may have been the regulatory scheme when Sessa was decided, the regulations applicable to this case clearly authorize the claims examiner to make an award of compensation based on a settlement reached at an informal conference.

Barulec argues, however, that these regulations are invalid, because the functions of the deputy commissioner that they purport to delegate are discretionary, and cannot be delegated. He bases this argument on section 8(i) (A) of the LHWCA, which provides:

> "Whenever the deputy commissioner determines that it is for the best interest of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation,

> notwithstanding the provisions of section 915 (b) and section 916 of this title...."

33 U.S. § 908(i) (A). It is Barulec's position that the deputy commissioner's duty to determine whether a settlement is "for the best interest" of the employee is a personal one that cannot be validly assigned to another.

However, we conclude that section 8 (i) (A) relates only to settlements reached by the parties independently, and not to settlements worked out at an informal conference, such as that involved here. From its context, it is clear that the purpose of section 8 (i) (A) is to permit the deputy commissioner to approve settlements that would otherwise be outlawed by sections 15 (b) and 16 of the LHWCA, which invalidate agreements by an employee to waive his right to compensation, 33 U.S.C. § 915(b), and

"assignment, release, or commutation of compensation," id. § 916. This is the interpretation adopted by the OWCP and reflected in the implementing regulations. Compare 20 C.F.R. § 702.241 (1976) with id. §§ 702.311-.316.

The deputy commissioner's authority to award compensation based on a settlement reached at a conference arranged by the OWCP can reasonably be construed to be included under his general authority to "make or cause to be made such investigations as he considers necessary in respect of [a] claim.... [If no hearing is requested,] the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim." 33U.S.C. § 919 (c) (emphasis supplied). This provision expressly authorizes the deputy commissioner to delegate the function of investigating claims, and the regulations quoted above reflect that author-

ization. Nothing about the duties delegated suggests that they can or may be performed only by the deputy commissioner himself. An informal conference is the first stage of the OWCP's investigation "in respect of" a claim, a step designed to resolve "misunderstandings, clerical or mechanical errors, or mistakes of fact or law," 20 C.F.R. § 702.301 (1976), and to provide the parties an opportunity to amicably settle their dispute, id. § 702.315. The agency official who presides at such a conference may be called on to exercise good sense, tact, and diplomacy, but he is neither required nor authorized to impose a solution on the parties: if they do not reach a settlement at the conference, he can recommend one, but if they do not accept his recommendation the case is referred to an administrative law judge for a formal hearing. Id. § 702. 316. Since the deputy

commissioner's function at the conference does not involve a unilateral resolution of the merits of the dispute binding on the parties over their objection, it appears reasonable to conclude that his authority is delegable.[5] Such delegation cannot prejudice any party and yet decidedly facilitates operation of the system.

In sum, the OWCP processed Barulec's claim in accordance with its regular procedures, and duly confirmed a settlement which those procedures were designed to facilitate. The agency took official action with regard to the claim, and, as a consequence of that action, an informal award was made disposing of the claim. This is enough to trigger an assignment of the employee's right to sue third parties under section 33 (b).

Barulec argues, however, that even if the agency action relating to his claim is

sufficient to trigger an assignment of his right to sue third parties, no such assignment should be recognized here because this case falls within the exception to the mandate of section 33 (b) carved out by Czaplicki v. The Hoegh Silvercloud, 351 U. S. 525 (1965), which allows an employee to sue in his own name when there is a conflict between the employer/assignee's interest and the employee/assignor's interest. We have discussed at length the arguments that Barulec makes on this point in a recent case and concluded that although the "conflict of interest" exception is still viable, "the Employee bears the burden of showing that his employer's interests conflict with his own, and that out of self interest his employer will not properly press the claim." Perez v. Arya National Shipping Line, Ltd., No. 76 Civ. 3009, slip op. at 6 (S.D.N.Y. April 17, 1979).

Barulec has made no such showing, but, as in Perez, Barulec is granted forty-five days from the filing of this memorandum within which to submit competent evidence establishing that a conflict of interest exists.

For the reasons stated, the defendant's motion for leave to amend the answer is granted, and the defendant's motion for summary judgment dismissing this action is denied, without prejudice to a renewed motion to dismiss after forty-five days.

It is so ordered.

DATED: New York, New York
May 31, 1979

MORRIS E. LASKER
U.S.D.J.

1. "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

33 U.S.C. § 933 (b).

2. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33, 44 Stat. 1424 (1927).

3. Section 33(b) was amended again in 1959 to allow the employee to sue third parties within six months of an award. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391.

4. The regulations were amended in 1977. 42 Fed. Reg. 45, 303 (September 9, 1977).

5. Nothing in Intercounty Construction Corp. v. Walter, 422 U.S. 1 (1975), suggests the contrary.

JUL 16 1980

MICHAEL RODAK, JR., CLERK

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION OF LOUIS PEREZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOLLIS M. WALKER, JR.
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Respondent

JOSEPH T. STEARNS
SANDRA R. M. GLUCK
Of Counsel

QUESTIONS PRESENTED

1. On the facts of petitioner, Louis Perez' longshoreman's personal injury case, subject to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901 *et* seq. (1927), an assignment having occurred by operation of LHWCA § 933(b) by virtue of petitioner's failure to bring suit against "third-party" petitioner within six months from an "award" of controverted compensation benefits pursuant to a formal order of the United States Department of Labor, District Deputy Commissioner, should: (a) the assignment be given effect to deny petitioner's right to sue on the basis of respondent's Fed.R.Civ.P. 17 real party in interest defense; or, (b) be denied effect because of a presumption of the existence of a sufficient "conflict of interests" between petitioner and his employer by virtue of the failure, for whatever reason, of the employer to sue respondent in petitioner's right to recover damages on account of the injury for which petitioner has received compensation?

2. Are the issues in this petitioner's case, involving a formal order awarding compensation benefits, fully subsumed in the petition of Frederico Rodriguez (also filed under Index No. 79-1977), making the granting of a writ of certiorari in this related case inappropriate for that reason?

Table of Contents

	PAGE
Questions Presented	i
Statutes Involved	2
Statement of the Case	2
Reasons for Denying Writ	3
Conclusion	5

Table of Cases

Louis Perez v. *Arya National Shipping, Ltd.*, 468 F. Supp. 799 (S.D.N.Y. 1979) 2

Statutes

Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. §901 *et seq*	i
33 U.S.C. §933(b)	i, 1, 2, 3, 4
33 U.S.C. §933(h)	3

Rules

Federal Rules of Civil Procedure:

Rule 12	3
Rule 17	i, 2, 3
Rule 56	3

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION OF LOUIS PEREZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent respectfully requests this Court deny the petition for writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Second Circuit dated March 19, 1980 (1d)[1] affirming the opinion of the United States District Court, Southern District of New York (468 F. Supp. 799) and final order of August 10, 1979 dismissing this longshoreman's personal injury suit on grounds of § 933(b), the LHWCA "assignment" provision.

1. References followed by the letters "f" and "d" are to be found in the Supplemental Appendix.

STATUTES INVOLVED

Involved in this case are Fed.R.Civ.P. 17(a), the "real party in interest" rule, and LHWCA § 933(b) which provides as follows:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

This action[2] involves a claim for damages for personal injury sustained by petitioner, Louis Perez, a longshoreman employed by Universal Terminal and Stevedoring Corp. (hereinafter the employer) in August 1973 (2f). In March 1975 the District Deputy Commissioner, Workmen's Compensation Board entered a formal order awarding petitioner compensation under the LHWCA (*id.*) which he accepted. Some fifteen months later, petitioner commenced the within action against respondent, the owner of the vessel aboard which he sustained the injuries for which compensation was paid (*id.*)[3]. In November 1978 respond-

2. *Perez* v. *Arya National Shipping Line, Ltd.,* Second Circuit Court of Appeals Index No. 79-7632. This appeal was argued jointly with a number of others involving the same or similar issues, although never consolidated by the Second Circuit. Nonetheless, Perez presents his petition joined with that of two other longshoremen/plaintiffs in a single petition filed under one index number. One, at least, of these, Rodriguez' petition, involves all the issues here presented.

3. This injury was diagnosed by petitioner's initial treating doctor as "contused abrasion of the left ankle," for which plaintiff was awarded compensation, for temporary, total and permanent, partial disability, of $5,560.83. He was allegedly totally disabled as a result of his injury for 7 6/7 weeks.

ent moved pursuant to Fed.R.Civ.P. 12, 17 and 56 for an order pursuant to LHWCA § 933(b) dismissing the case on grounds that petitioner's third-party claim against respondent had been assigned to his employer six months after his acceptance of additional compensation pursuant to the Deputy Commissioner's order. This motion was denied by opinion and order of the United States District Court, Southern District of New York (Hon. Morris E. Lasker) without prejudice to renewal after forty-five days, the time alloted by the Court to petitioner to submit evidence of the existence of a conflict of interests between himself and his employer sufficient to deny the assignment of his cause of action effect.[4]

In July 1979, respondent renewed its motion to dismiss, petitioner having taken no steps to prove an actual conflict of interest. On August 10, 1979 respondent's summary judgment motion was granted, from which final order petitioner appealed. The order of the district court was affirmed by the Second Circuit Court of Appeals March 19, 1980 ". . . for the reasons stated in [the Second Circuit Court of Appeals'] opinion in the case of *Frederico Rodriguez* v. *Compass Shipping Co., Ltd. and Djakarta Lloyd P.N.*, Docket No. 79-7132." (1d).

REASONS FOR DENYING WRIT

Respondent urges that the petition be denied for reasons stated in the brief of respondents' Compass Shipping

4. Although not mentioned in the District Court's opinion, (properly so since it did not conform to the requirements of Fed.R.Civ.P. 56), petitioner submitted an attorney's hearsay affidavit in opposition to respondent's motion in which the employer's insurer's "claims attorney" was quoted to the effect that the employer's insurer (subrogated to the employer's interest by virtue of LHWCA § 933(h)) did not intend to sue out of "fear that [suit] . . . would adversely effect . . . [the employer's] economic relationship with the steamship company."

Co., Ltd. and Djakarta Lloyd P.N. in opposition to the petition of Frederico Rodriguez for writ of certiorari (Index No. 79-1977). In addition, respondent urges that the petition in this case need not be considered, and should not be granted, because all issues important to this petition are before the Court in the petition of Frederico Rodriguez. In that case *no* formal order of the District Deputy Commissioner was ever entered, a fact which the Second Circuit Court of Appeals, in upholding dismissal of that case on grounds of the §933(b) assignment, found not significant.

This case *does* involve a formal order and the "procedural" issue raised in the Rodriguez' petition is, hence, not present. All aspects of the issues common to both: the question of "revestiture" of the cause of action as a result of the employer's failure to bring suit against respondent, and/or the correctness of the holding giving effect to the LHWCA §933(b) assignment despite the employer's apparent disinclination to sue, are presented in the companion Rodriguez petition. As in Rodriguez, Perez, despite opportunity extended by the district court to prove an actual conflict of interests, did not do so. In fact, the same presumed motive, the apparent policy of employers, for customer relations reasons, not to sue on the §933(b) assignment is presented in this case as an alleged sufficient "conflict of interests" so as to avoid giving the assignment effect. This issue is argued in the Rodriguez petition. There being absolutely no additional issues to be considered by this petition, it should be in any event denied.

CONCLUSION

Since consideration of this petition is unnecessary in order to determine any of the issues presented in this or the companion petition of Frederico Rodriguez, it should be in any event denied.

Dated: New York, N. Y.
July 14, 1980

Respectfully submitted,

HOLLIS M. WALKER, JR.
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Respondent

JOSEPH T. STEARNS
SANDRA R. M. GLUCK
Of Counsel

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and
DJAKARTA LLOYD, P.N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION OF FREDERICO RODRIGUEZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOLLIS M. WALKER, JR.
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Respondents

JOSEPH T. STEARNS
SANDRA R. M. GLUCK
Of Counsel

Questions Presented

1. On the facts of petitioner, Frederico Rodriguez' longshoreman's personal injury case, subject to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901 *et seq.* (1927), was there an assignment by operation of LHWCA § 933(b) of "all right" of petitioner against third-party respondents as a result of petitioner's applying to the United States Department of Labor, Office of Workers' Compensation Programs ("OWCP") and later accepting, a "settlement award," disposing of a controverted compensation claim and resulting in payment by the employer of additional compensation for temporary total and permanent partial disability, upon petitioner's admitted failure to thereafter bring suit against "third party" respondents, allegedly responsible for the injury for which compensation was paid, within six months of acceptance of an "award" of such additional compensation?

2. Assuming that an assignment occurred, should it be given effect when petitioner failed to establish, despite opportunity afforded him by the district court, an actual "conflict of interests" between himself and his employer; or should it be denied effect on the basis of a presumption of the existence of a sufficient interests conflict by virtue of the failure, for whatever reason, of the employer to sue respondents, in petitioner's right, to recover damages on account of the injury for which petitioner has received compensation?

Table of Contents

	PAGE
Questions Presented	i
Statutes Involved	2
Statement of the Case	2
Reasons for Denying Writ	9
Conclusion	27

Table of Cases

American Stevedores, Inc. v. *Porello,* 330 U.S. 446 (1947) 11, 16, 17, 18, 21, 22, 27

Baccile v. *Halcyon Lines,* 89 F. Supp 765 (E.D.Pa. 1950), rev'd, 187 F.2d 403 (3rd Cir. 1951) 18

Bloomer v. *Liberty Mutual Ins. Co.,* — U.S. — , 100 S.Ct. 952, 63 L.Ed.2d 215 (1980) 15, 19, 24

Caldwell v. *Ogden Sea Transport, Inc.,* 618 F.2d 1037 (4th Cir. 1980) 8, 9, 10, 11, 12, 14, 15, 21, 23, 24, 26

Celanese Corp. of America v. *John Clark Industries, Inc.,* 214 F.2d 551 (5th Cir. 1954) 24

Cooper Stevedoring Co., Inc. v. *Fritz Kopke, Inc.,* 417 U.S. 106, 110 (1974) 19

Cupo v. *Isthmian S.S. Co.,* 56 F. Supp. 45 (S.D.N.Y. 1941) 16

Czaplicki v. *The Vessel "S.S. Hoegh Silvercloud,"* 351 U.S. 525 (1956) 5, 12, 13, 14, 15, 20, 21, 22, 23, 26, 27

Edmonds v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) 25

Federal Marine Terminals Inc. v. *Burnside Shipping Co., Ltd.,* 394 U.S. 404, 417-418 (1969) 19, 25

Fontana v. *Pennsylvania R. Co.,* 106 F. Supp. 461 (S.D.N.Y. 1952), aff'd, 205 F.2d 151 (2d Cir. 1953) 19

PAGE

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) reversing *sub nom.* 187 F.2d 403 (3rd Cir. 1951) 18, 19, 20, 21, 22, 25

In Re Seaboard Shipping Corporation, 449 F.2d 132 (2d Cir. 1971) 17

Intercounty Construction Corporation v. *Walter*, 422 U.S. 1 (1975) 8

Johnson v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) 9

Landon v. *Lief Hoegh And Co., Inc.*, 521 F.2d 756 (2d Cir. (1975), cert. sought on other grounds and denied, 423 U.S. 1053 (1976), reh. den., 424 U.S. 935 (1976) 25

Liberty Mutual Insurance Co. v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) 10

McClendon v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965) 9

Pope & Talbot Inc. v. *Hawn*, 346 U.S. 406 (1953) 18, 19, 20, 21, 22, 25

Potomac Electric Power Co. v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) 9

Frederico Rodriguez v. *Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N.*, 456 F. Supp. 1014 (S.D.N.Y. 1978), aff'd, 617 F.2d 955 (2d Cir. 1980) 1, 2

Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 13, 14, 20, 23

The Etna, 138 F.2d 37 (3rd Cir. 1943) 19

Toomey v. *Waterman S.S. Corporation*, 123 F.2d 718 (2d Cir. 1941) 16

Valentino v. *Rickners Rhederei, G.M.B.H.*, 552 F.2d 466 (2d Cir. 1977) 23

Virginia Electric & Power Co. v. *Westinghouse Electric Corp.*, 485 F.2d 78 (4th Cir. 1973) 24

Table of Authorities

PAGE

H.R. Rep. No. 1945, 75th Cong., 3rd Sess. (1938) 16

S. Rep. No. 92-1125, 92nd Cong. 2nd Sess. 4 (1972) 24

S. Rep. No. 428, 86th Cong., 1st Sess., reprinted in [1959] U.S. Code Cong. and Ad. News 2134-35 .....14, 15

Statutes

Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. § 901 *et seq* i

33 U.S.C. § 905 ..... 5, 19, 22, 25

33 U.S.C. § 908 6

33 U.S.C. § 914 .....6, 10, 16, 18

33 U.S.C. § 933 .....i, 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27

44 Stat. 1440 15

52 Stat 1168 13

73 Stat. 391 .....9, 13, 22

86 Stat. 1262 ..... 2, 22

Rules

Federal Rules of Civil Procedure:

Rule 12 4

Rule 17 .....1, 2, 4, 8, 9, 11, 12, 24

Rule 56 ..... 4, 5

Regulations

Codes of Federal Regulations:

20 C.F.R. § 702.312 8

20 C.F.R. § 702.315(a) 4, 7, 8

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and
DJAKARTA LLOYD, P.N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION OF FREDERICO RODRIGUEZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully request this Court deny the petition for writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Second Circuit (617 F.2d 955) dated March 19, 1980 affirming the opinion of the United States District Court, Southern District of New York dated September 12, 1978 (456 F. Supp. 1014) and final order of December 6, 1978 dismissing this longshoreman's personal injury suit on grounds of § 933(b), the "assignment" provision of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. (hereinafter "LHWCA"), and Fed.R.Civ.P. 17(a).

STATUTES INVOLVED

Involved in this case are Fed.R.Civ.P. 17(a) the "real party in interest" rule and LHWCA § 933(b) which provides as follows:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

This action[1] involves a claim of damages for personal injuries sustained by Frederico Rodriguez, a longshoreman employed by International Terminal Operating Co., Inc. (2e)[2] (hereinafter the "employer") on September 4, 1973.[3] At that time, plaintiff and other co-employees of the contract stevedore were unloading a shipment of coffee from

---

1. *Frederico Rodriguez* v. *Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N.*, Second Circuit Court of Appeals, Index No. 79-7132. This appeal was argued jointly with a number of others involving the same or similar issues, although never consolidated by the Second Circuit. Nonetheless, Rodriguez presents his petition joined with that of two other longshoremen/plaintiffs in a single petition filed under one index number, despite which all of the respondents listed in petitioners' caption will answer, each in their turn, to the appropriate petitioner, in the belief that the circumstances so require. This confusion, of petitioner's making, may be compounded since attorneys for Compass, Djakarta Lloyd and Ayra National Shipping Line, Ltd. (in Second Circuit Civil No. 79-7632) do not represent Ove Skou, R.A., respondent in the case once bearing Second Circuit Index No. 79-7630.

2. References suffixed by letter (e) refer to Appendix E, part of the supplemental appendix. Those suffixed by letter "a" refer to pages in Appendix A made physicially part of the petition.

3. *After* the effective date of the 1972 Amendments to the LHWCA, 86 Stat. 1262.

the No. 2 hatch of respondents' vessel, S/S SOUTH BREEZE, which was then docked at a pier in Brooklyn, New York (2e).

S/S SOUTH BREEZE was owned by respondent, Compass Shipping Company Ltd. ("Compass") and was at the time of petitioner's injury being operated under bareboat charter to respondent, Djakarta Lloyd, P.N. ("Djakarta Lloyd") (2e). According to petitioner, he injured himself when in the course of leaving work he climbed up the ladder from the vessel's No. 2 hatch and upon reaching the level of the main or weather deck, put his foot into a "hole" (actually the accessway leading to the No. 3 hatch on the other side of the common bulkhead between these two hatches) above the ladder which descended into the adjacent No. 3 hatch (*id.*).

Following his injury petitioner made claim against his employer under the LHWCA which eventually caused "some form of dispute" requiring the attention of the OWCP, United States Department of Labor (6e). The resulting consideration before that agency at a so-called informal conference led to settlement of petitioner's remaining compensation claims, for among other things permanent partial disability benefits for the supposed permanent effects of an injury originally diagnosed as a "contusion and puncture" wound, which settlement entailed payment of $2,623.03. This amount represented the "total agreed upon compensation" of $3,610.21, less amounts previously paid, as well as an "approved fee" for plaintiff's compensation representative (19e).

This settlement was embodied in an OWCP form reciting that: "[w]e, the undersigned, having attended an informal conference, and having received a copy of the [within] signed agreement, in this case on 11/4/74 (sic) agree, by the issuance of a compensation order, to the following disposition" (6e).

As the district court noted (*id.*) the settlement indicated the specifics of the disposition and concluded: "the employer-carrier shall make payment promptly following the conference, without regard to the receipt of the formal order, in accordance with § 702.315(a) of the Regulations [20 C.F.R. § 702.315(a)]." As the district court also found, this document was signed by the petitioner, his representative, a representative of the employer and a United States Department of Labor, OWCP "claims examiner" (*id.*).

As is also recited in the district court's opinion, "[petitioner] does not dispute that he received compensation for his injuries from his employer, or that he instituted suit against . . . [respondents] more than six months after the [above described] settlement agreement or receipt of the compensation [paid thereunder]" (6e-7e). In fact, petitioner started suit against the shipowner Compass alone by filing a complaint alleging negligence in the United States District Court, Southern District of New York on June 2, 1976 (3e), little more than three months before lapse of three years from the occurrence of the injury in suit and about nineteen months after settlement and payment of his compensation claim.

On April 16, 1978 respondents moved to dismiss plaintiff's complaint seeking judgment on the pleadings and/or summary judgment pursuant to Fed.R.Civ.P. 12, 17 and 56. This motion was based on the § 933(b) assignment of "all right" of the petitioner to his employer six months after acceptance of an "award" of compensation "in an order filed by the deputy commissioner or [Benefits Review] Board," as a result of which petitioner was said by respondents not to be the real party in interest with respect to the subject matter of this suit. At the same time, respondents moved in the alternative for summary judgment on the question of whether, assuming petitioner's standing to sue, the negli-

gence alleged by plaintiff was actionable under LHWCA § 905(b), pursuant to which this suit was brought. The basis of this aspect of respondents' dismissal motion was that respondents were not liable for petitioner's injury in light of his total inability to account at his pre-trial deposition for the occurrence of his injury in terms other than some supposed unseaworthy condition, or on basis of his own entire fault.[4]

On September 12, 1978 the district court (Hon. Robert L. Carter) denied that part of respondents' summary judgment motion seeking determination that actionable fault could not be shown on ground of the existence of a question of fact regarding respondents' liability for the occurrence of petitioner's injury, while reserving judgment, pending discovery, on the motion to dismiss on grounds of § 933(b) assignment. The district court allowed petitioner sixty days to effect discovery to afford an opportunity to demonstrate the existence of a conflict of interests in fact, since none was held to exist in law, between petitioner and his employer, in light of this Court's decision in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud,"* 351 U.S. 525 (1956).

Petitioner did not, however, avail himself of discovery on this issue; instead, his attorney relied upon a tardily submitted hearsay declaration, attributed to the employer's claims manager, that the employer had, as the Second Circuit observed, "a policy of not prosecuting actions based on 33(b) [33 U.S.C. § 933(b)] assignment" (7b). Nothing being presented to the district court fulfilling the requirement of Fed.R.Civ.P. 56, that matters in opposition to a

4. There was a third basis upon which dismissal was urged, having to do with a dismissal of petitioner's prior action against Compass only. This third basis was rejected by the district court, properly so, and, accordingly, no cross-appeal on that ground was taken by respondents. This action, in which Djakarta Lloyd was joined, was begun July 12, 1977.

motion for summary judgment " . . . shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein," on December 6, 1978 the action in district court was finally dismissed.

The opinion of the district court can be summarized as holding that where an application for additional compensation benefits is made (in this case for an award, among other things, for permanent partial disability under LHWCA § 908), beyond those sums voluntarily paid under § 914, and the claim is first resisted by the employer and then settled at the recommendation *and* with the approval of a OWCP "claims examiner;" and where the settlement sum is paid by the employer and accepted by the employee who thereafter fails to sue the responsible third-party within six months, all right of the employee against such third parties is assigned to the employer by operation of § 933(b). That is, the district court held that where, as in this case, the parties agreed "by the issuance of a compensation order" to a settlement of a disputed matter of entitlement to further compensation under the auspices of the OWCP and through resort to (and compulsion of) its adjudicative procedures, such compensated employee has thereafter six months (from acceptance) to sue, failing which his third-party rights are assigned to his employer, despite the fact that in this case no formal order was *ever* issued, a shortcoming neither the district court nor the court of appeals thought significant. The district court also held that no conflict of interest between employee and employer should be presumed to exist or be found in law, and that the burden of proof of such conflict sufficient to deny the assignment effect lay with the petitioner, not respondents.

Upon appeal the district court judgment was affirmed, the unanimous Second Circuit Court of Appeals holding

that the "settlement agreement," embodied in the document prepared and signed by the OWCP claims examiner as well as those others concerned, was an "award in a compensation order of the deputy commissioner or [Workmens' Compensation] (sic) Board within the meaning of § 33(b) [33 U.S.C. § 933(b)], triggering its assignment provisions" (8b); and that "failure of an administrator to comply with the formality imposed by departmental regulations . . . of filing the formal order [after the settlement agreement was reached, as required by 20 C.F.R. § 702.315(a)] . . . [could] . . . have no significance as far as the substantive rights of the parties are concerned" (10b-11b). The Second Circuit gave the assignment effect despite petitioner's claim of "interest conflict" arising from an assumption that the employer " . . . often chooses not to antagonize its customer, the shipowner, by bringing suit against it," holding that the six month time period in which to sue provided by § 933(b) was not " . . . unreasonable or harsh under the circumstances" (12b).

Petitioner apparently all but concedes the fact of assignment, that the intervention and active participation of the OWCP and its "claims examiner" constituted *sufficient* participation by the Deputy Commissioner, United States Department of Labor—through his delegee, the claims examiner—so as to make the settlement agreement "a compensation order for all intents and purposes" (16e), and a § 933(b) "award," acceptance of which was sufficient to trigger the beginning of the six month time to sue period.[5]

5. It is not until page 18 of his 19 page petition that petitioner treats of the "procedural" issue of sufficient action by the Deputy Commissioner to trigger the beginning of the six month time to sue provision of § 933(b), since no formal order was ever issued. In so doing, petitioner raises issue of the circuit court of appeals' alleged confusion respecting the offices of the Director of the OWCP and the Deputy Commissioner. Petitioner now argues that the Director may authorize anyone to enter an order, while the Deputy Commissioner, who has the right by statute to enter an order, "may not

So much virtually conceded, petitioner characterizes as "overriding", the issue of whether the assignment should be given effect. In short, petitioner claims the case wrongly decided, on what has been elsewhere called the "revestiture" issue, by both the district court and Court of Appeals; and would prefer the holding of the Fourth Circuit Court of Appeals in *Caldwell* v. *Ogden Sea Transport, Inc.* (and related cases) 618 F.2d 1037 (decided March 27, 1980), of which petitioner makes much in order to demonstrate a conflict between circuits.

The Fourth Circuit Court of Appeals in *Caldwell* and the Second Circuit in the case at bar held that by virtue of LHWCA § 933(b) an assignment had occurred despite which the Fourth Circuit, unlike the Second Circuit, held

---

authorize anyone else to do so for him." This rather begs the point. As the district court held and as was affirmed by the unanimous Court of Appeals, the failure to issue an order was a "technical administrative lapse" (9e) in circumstances where: (1) by regulation the claims examiner was empowered (20 C.F.R. § 702.312) to discharge the duties of the Deputy Commissioner, which at the time material to this appeal entailed the power to issue an order on the Deputy Commissioner's behalf, and (2), the Deputy Commissioner (or his § 702.312 delegee, the claims examiner) was "explicit[ly] command[ed]" (6e) by regulation, (20 C.F.R. §702.315(a)), to issue a formal order. This supposed defect in the record of the compensation proceeding was properly held to be of no moment, for reason of the fact by virture of 20 C.F.R. § 702.315(a) the obligation of the employer in agreement to pay arises immediately, independent of any further administrative action, i.e., the issuance of a formal order.

Whatever the significance of the existence, or lack thereof, of a formal order with respect to the availability of further recourse to compensation under the LHWCA, the district court and Court of Appeals properly held that this had *no effect* on the question of the assignment of the "third party" cause of action to the employer. Thus, petitioner cites *Intercounty Construction Corporation* v. *Walter,* 422 U.S. 1 (1975), as he did to the Court of Appeals, ignoring the profound difference in policy considerations underlying the right to recourse to further compensation as opposed to allowing, as the Court of Appeals correctly held, the substantive rights of third parties to be affected by a lapse of responsibility by the Department of Labor, particularly when that lapse had had no practical effect on those first and second parties subject to the compensation proceeding.

that the right of plaintiff to sue allegedly responsible third parties 'revested" as a result of inaction, for whatever reason, of the assignee/employer in failing to bring suit. The issue in this petition is, overwhelming, a question *not* whether assignment occurred in the facts presented as a result of the disposition of the compensation claim of any of the three petitioners, or whether a third party may assert it as a Fed.R.Civ.P. 17 defense; but whether an assignment, having occurred, should be given effect so as to bar suit in their names. The said to be sufficient basis for denying the assignment effect, is a supposed "conflict of interests" between the employee and employer (longshoreman and stevedore), a formerly vital consideration and an important problem for which this Court, by radically different means, twice sought to achieve an acceptable solution. What follows is respondents' attempt to show the Court that "conflict of interests" is, at last, no longer a problem in longshoremen's personal injury cases sufficient to require this Court to presumptively deny effect to an unambiguous provision in an Act of Congress, and why the *apparent* conflict between circuits is at this time no basis for granting a writ of certiorari.

REASONS FOR DENYING THE WRIT

Although petitioner claims a conflict between the Second Circuit Court of Appeals and the Third[6], Fourth[7], Fifth[8] and District of Columbia circuits[9] (*cf.* Petition, page 18),

6. Based on *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) a case interpreting § 933(b) prior to its amendment in 1959, 73 Stat. 391.

7. *Caldwell* v. *Ogden Sea Transport, Inc., supra.*

8. *McClendon* v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965), decided prior to the 1972 Amendments to LHWCA, insulating employers from liability beyond workmen's compensation.

9. *Potomac Electric Power Co.* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965), a case similarly interpreting § 933(b) after the 1959 Amendments, but before renovation of the LHWCA in 1972.

a true conflict exists only between the Second and Fourth circuits, the only courts of appeals which have considered the LHWCA § 933(b) conflict of interests question since the 1972 Amendments. Importantly, this conflict between circuits is theoretical only.

Application of *Caldwell* v. *Ogden Sea Transport, Inc., supra,* and the Second Circuit holding which is the subject of this petition, to the facts presented to the Fourth Circuit Court of Appeals in the *"Caldwell"* group of cases, would achieve the same result—a ruling that dismissal on grounds of the § 933(b) assignment would *not* lie. Respondents contend that the Second Circuit Court of Appeals would *not* agree that the participation in the *"Caldwell"* cases by the Department of Labor, Deputy Commissioner (in fact no participation at all) was sufficient to trigger the § 933(b) assignment.

In no case considered by the Fourth Circuit Court of Appeals was *any* action taken by the Department of Labor through *any* of its agencies. Unquestionably, there was *no* "acceptance of compensation under an award in a compensation order filed by the deputy commissioner or Board..." (§ 933(b)). In every case there was *no* order and *no* award —*only* voluntary payments pursuant to LHWCA § 914. Despite the plain provision of the LHWCA assignment section to the contrary, and after acknowledging the fact that in each *"Caldwell"* case ". . . a workman . . . brought a third person (sic) LHWCA action more than six months after receipt of the last of compensation benefits paid without contravention of liability by an employer or his assured," (618 F.2d at 1040), the Fourth Circuit nonetheless held the § 933(b) assignment "triggered by the uncontested payment of compensation benefits" (*id*). This holding, apparently believed to have been compelled by an earlier opinion of that court in *Liberty Mutual Insurance Co.* v. *Ameta & Co.,* 564 F.2d 1097 (4th Cir. 1977), is clearly error. If this be

so, the Fourth Circuit *unnecessarily* proceeded to consider a "second" question of a concurrent right in the employee and employer to sue third parties after six months, as well as a final or, according to petitioner, "overriding" question, whether, if assigned, the right of action may, as the *Caldwell* court held, be "revested in the longshoreman when it becomes manifest that the assignee [employer], with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason" (618 F.2d at 1046).

On basis of the absence of participation of the Department of Labor in the *"Caldwell"* cases, the Second Circuit would surely find *no* assignment had occurred.[10] On the facts of the case at bar, the Fourth Circuit would, in light of the activities of the board in achieving settlement of petitioner's compensation claim, perforce, hold that an assignment had occurred, but that the right of action against respondents was "revested" as a result of a "presumed. . . conflict of interest" (618 F.2d at 1040) demonstrated by the employer's inaction. If, however, the Second Circuit's holding is correct, petitioner is not aggrieved and as a practical matter no one of the *"Caldwell"* plaintiffs or defendants is aggrieved either. The potential grievance resulting from the theoretical, as opposed to practical, effect of the differing analyses of the Second and Fourth circuits will lie on behalf of: (1) some future third-party who, by virtue of the Fourth Circuit's *Caldwell* reasoning, will be sued by a "revested" employee after a true assignment has occurred in contravention of Fed.R.Civ.P. 17(a),

10. In the case subject to this petition, in district court, Judge Carter correctly held that ". . . as the statute makes clear, mere acceptance of compensation, absent an 'award', does not effect a statutory assignment of the injured party's claim" (12e). For this proposition the district court cited, among other cases, *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947) which cannot be read other than as demonstrating that the Fourth Circuit was wrong in deciding that assignments had occurred.

or (2) an employee improperly deprived of control of his third-party action by virtue of mere acceptance of voluntarily paid compensation, where the employer chooses to assert the § 933(b) third-party claim. Such case is not before the Court, and may never be.

As the Fourth Circuit might be seen to have achieved the right result as a result of consecutive errors, a comparison of that decision and the opinion of the Second Circuit is invited. Such comparison, respondents submit, will demonstrate why *Caldwell* was wrongly decided. There is: (1) no basis for saying on the *"Caldwell"* facts that the § 933(b) assignment provision was ever triggered; or (2) that revestiture by mere inaction by the assignee/employer, which clearly contravenes the plain meaning of an Act of Congress, has any support in § 933(b) or in any currently apposite case; and (3) such holding is in conflict with Fed.R.Civ.P. 17 and the purpose of Congress in enacting the 1959 and 1972 Amendments to the LHWCA, and by the latter all but totally renovating the law applicable to longshoremen's personal injury cases.

It should be initially appreciated that the Second Circuit applied the language of § 933(b) to the facts both in their "procedural" aspect, i.e. in determining when and in what circumstances an assignment occurs, as well as with respect to its "substantive" aspect—that the fact of assignment establishes a right of a third-party to assert a Fed.R.-Civ.P. 17 real party in interest defense. In short, the Second Circuit applied the law while the Fourth Circuit, needlessly, found a "solution," one mistakenly said to be "building upon" (618 F.2d at 1044) and, in fact, improperly extending, this Court's holding in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud," supra.*

Respondents submit that *Czaplicki* was the capstone of efforts by this Court to overcome a conflict of interests problem introduced into the law of the longshoremen's and

harbor workers' personal injury cases by amendment to the LHWCA § 933(b) in 1938, 52 Stat. 1168. Read literally, *Czaplicki* addresses the interests conflict question between the employer and employee under the LHWCA from the perspective of concern that employers would not sue on the § 933(b) assignment (351 U.S. at 531), and to that extent is directly relevant to the present problem of employers' inaction. But *Czaplicki* should be seen as an expression of concern about much more, and as a response of the Court to a peril to an injured longshoreman's third-party action far graver than the threat of mere inaction by the assignee/employer in failing to sue as a result, for example, of a desire to maintain customer relationships.

In 1956 at the time of this Court's *Czaplicki* decision, employers had no less than the power under § 933(b) to deny an injured employee either his right to compensation, or control of his third-party cause of action. This was because assignment of the third-party cause of action, as § 933(b) LHWCA read after amendment in 1938, depended only upon acceptance of compensation pursuant to an "award." In such circumstances, in order to cause an assignment, the employer needed only to force the compensation board to order payment of benefits by unjustifiably refusing to pay compensation in the first instance. As a result, an employee, taking every step to preserve his third-party claim short of the desperate measure of foregoing compensation while totally disabled, could nonetheless be deprived of control of his suit. After this Court's decision in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), his retention of control was vital, since his suit in the hands of his employer would have been a suit by his assignee seeking recovery of damages from itself.

But by virtue of the 1959 Amendments to § 933(b), 73 Stat. 391, providing six months to sue after acceptance of

an "award" of compensation, no vigilant employee can now be deprived of his right to sue, even if he also chooses to exhaust his compensation entitlement. As *Czaplicki* responded to a conflict of interests problem presented in *every* post-*Ryan* longshoreman's action, and since it was designed not just to save control of a longshoreman's suit from the consequences of his inattention, but to prevent improper interference by his employer having power as a practical matter to compel an assignment, this case can only be seen as *the* high-water mark beyond which this Court, when presented with a far more pervasive and serious problem than that which courts today confront, was unwilling to go (see 351 U.S. at 532). It cannot, therefore, be properly seen as a holding which in present circumstances can be properly "built upon," to achieve the solution sought by the Fourth Circuit in *Caldwell,* i.e., "revesting" of the assigned third-party cause of action in the employee as a result of the employer's failure to sue on account of an alleged conflict of interests presumed merely from that fact.

Mere disinclination on the part of the employer to sue was, however, a matter *also* dealt with by Congress in amending § 933(b) in 1959. And although the Fourth Circuit's *Caldwell* holding is clearly based upon the belief that "... it certainly cannot be thought to have been intended by Congress that the longeshoremen's substantive [third-party] right might be lost simply through inaction by the assignee ..." (618 F.2d at 1045), any such intention to preserve to the employee the third-party right in all circumstances is nowhere affirmatively expressed. This fact is important since Congress acted in the area of "incentive to employers to protect the interests of the employee as much as possible" in suit on the § 933(b) assignment by, in 1959, enacting § 933(e)(2), giving the employer a right to retain one-fifth of any sum recovered in excess of compensation benefits paid or owed. See S. Rep. No. 428, 86th Cong., 1st

Sess. reprinted in [1959] U.S. Code Cong. and Ad. News 2134-35. Congress having acted to provide incentive for § 933(b) suits, this incentive should be deemed the sufficient "guarantee" of the employee's interest in having LHWCA § 933(b) suits brought by his employer. In evaluation of the appropriateness of the absolute guarantee achieved by the Fourth Circuit in *Caldwell,* courts should heed this fact, and this Court should view the Fourth Circuit holding on the "revestiture" issue as what it is—plain error.

In so extending *Czaplicki* the Fourth Circuit additionally mistook the development of the law of maritime personal injuries involving harbor workers as affected by LHWCA § 933(b) through its various amendments, as well as the reason why *Czaplicki* was a required holding in 1956 and is today no longer needed.

The LHWCA was enacted in 1927, 44 Stat. 1440, and originally provided a most sharply restricted right on behalf of covered employees to sue "third parties."[11] Section 933(a) of the LHWCA as originally enacted provided to a covered employee an election between a third-party claim for damages or compensation, while § 933(b) in its original form provided for an assignment of the employee's third-party rights to the employer upon *mere payment* of benefits. *Bloomer* v. *Liberty Mutual Ins. Co.,* — U.S. — , 100 S.Ct. 925, 63 L.Ed. 2d 215 (1980). As a result of the original language of §§ 933(a) and (b) there was *no* conflict of interests of any legal significance between employee and employer.

11. Any sensible interpretation of longshoremen's third party actions must acknowledge that the employee's right to sue those responsible for a compensable injury has *always been* a restricted right. It should follow, in light of the extraordinarily generous benefits available in compensation to covered employees, that there is no present reason to view the remaining modest restriction as in any way inappropriate or oppressive.

In 1938, however, in response to criticism that longshoremen entitled to voluntary compensation under § 914 of the Act were improperly being deprived of their third-party rights as a result of failing to appreciate the effect of acceptance of such compensation on the right to sue a negligent third-party,[12] Congress amended § 933(b) (and 933(b) *only*) to provide for an assignment when such compensation had been paid: "under an award in a compensation order filed by the deputy commissioner." This change presented the potential of an employee/employer (longshoreman/stevedore) conflict of interests, in light of this Court's interpretation of the purposes of Congress in enacting the 1938 Amendments.

Despite the fact that the 1938 Amendment to § 933(b) was arguably designed only to prevent a forfeiture of the third-party claim where an employee, intending to sue, unwittingly accepted voluntary compensation, this Court in *American Stevedores, Inc.* v. *Porello, supra,* held that Congress intended the 1938 Amendment to accord to an injured employee a right both to accept voluntarily paid compensation and to maintain a third-party suit for damages against, for example, a negligent shipowner, despite the fact that § 933(a) had not been amended and continued to provide that an injured employee must elect between compensation and suit for damages.[13] Elsewhere in its opinion, the Court held that if the contract for stevedore services entered into between the parties before the Court (the shipowner and the stevedore) was not controlling, the district

12. See *Cupo* v. *Isthmian S.S. Co.,* 56 F. Supp. 45 (S.D.N.Y. 1941) and H.R. Rep. No. 1945, 75 Cong., 3rd Sess. (1938), which accompanied legislation amending § 933(b) in 1938.

13. For suggestion of the possibility of an appropriate, less expansive interpretation, see *Toomey* v. *Waterman S.S. Corporation,* 123 F.2d 718 (2d Cir. 1941) (dictum). The justice of this Court's more liberal interpretation of the purpose of Congress in enacting the 1938 Amendment to § 933(b) defies challenge if considered in light of the remedial purposes of the LHWCA and the modesty of the then available benefits.

court ". . . would, of course, be free to adjudge the responsibility of . . . [those] . . . parties . . . under applicable rules of admiralty law." 330 U.S. at 458.

In *American Stevedores, Inc.* v. *Porello,* this Court in addition to holding that an injured longshoreman could sue, despite acceptance of voluntarily paid compensation, and need not, prior to accepting an "award" of compensation, elect between remedies, at least powerfully suggested that the burden of such third-party suits be borne on the basis of some form of contribution by the stevedore, perhaps according to its proportionate fault.[14] This interpretation of the reach of the 1938 Amendments raised a conflict of interests and a serious one, in light of the power of the employer to deprive the employee of either his compensation right or his third-party action by the expedient of "forc-[ing] an award," a possibility acknowledged by the *Porello* court, 330 U.S. at 455, although the full implications following from that fact were seemingly not at that time clearly perceived.

As the LHWCA read after 1938, the compensation entitlement of the employee was necessarily uncertain, and his practical ability to make claim for it without hardship most tenuously established, because certainty (i.e. determination of extent) meant an "award" of compensation and, hence, assignment of the employee's third-party claim, while mere threat of "forcing an award" held potential of discouraging compensation claims in the first instance, at least in situations where the employee believed himself possessed of a valid third-party claim.[15] As a result of these unfortunate facts, extending a right of contribution against

---

14. See, *In Re Seaboard Shipping Corporation,* 449 F.2d 132 (2d Cir. 1971).

15. LHWCA § 933 (d) then and now empowers the employer to compromise the whole § 933(b) claim, including the employee's statutorily established interest in the "excess," § 933(e). This the employer could do to the disadvantage of the employee.

the employer to the third-party, on basis either of proportionate fault or the admiralty moiety rule of divided damages (See 330 U.S. at 458) created a conflict of interests to which the LHWCA, as then drafted, could not adequately respond.

In *Baccile* v. *Halcyon Lines,* 187 F.2d 403 (3rd Cir. 1951) (reversing 89 F. Supp. 765 (E.D.Pa. 1950)), the inappropriateness of contribution in longshoremen's personal injury cases, (since creating a conflict of interest between the employee and employer), was pointedly demonstrated. This Court responded appropriately in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952) (reversing *sub. nom* 187 F.2d 403 (3rd Cir. 1951)), holding that contribution was unavailable in all maritime law cases except those involving collision. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* whatever else it was intended to achieve, all but cured the conflict of interests created by the 1938 Amendments as interpreted by this Court in *American Stevedores, Inc.* v. *Porello.* And what remained to be achieved in order to encourage stevedores to make the voluntary payment of compensation required by LHWCA § 914 and to secure a longshoreman's dual right to accept voluntary compensation and sue for damages was soon accomplished.

Shortly thereafter, this Court's *Halcyon* rule was extended in *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953), a case in which this Court completely overcame the conflict of interests problem by depriving the shipowner of its sole remaining avenue of relief from imposition of the full burden of a longshoreman's "damages," by refusing to permit reduction of the shipowner's liability to injured longshoremen by the extent of the *then* "uncertain" (See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. at 284) compensation liability of a concurrently negligent stevedore.

Halcyon (as abridged) is today good law, whenever the party against whom damages are sought is "shielded by" LHWCA § 905. (*Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974)); and applies, or would have, in any case brought by a stevedore in its own right to recover its compensation liability from a shipowner, *Federal Marine Terminals Inc.* v. *Burnside Shipping Co., Ltd.*, 394 U.S. 404, 417-418 (1969). It might be that the same cannot be said for this Court's *Pope & Talbot* holding, at least to the extent the decision in that case touched upon, or was motivated by, concern about the question of the "conflict of interests" in the aftermath of the 1938 Amendments to § 933(b). In *Pope & Talbot* this Court, apparently acting upon the belief that the employer paying benefits under the LHWCA was entitled to assert a "lien" on the proceeds of a compensated employee's suit,[16] denied the shipowner a reduction of liability owed the longshoreman by the amount of the uncertain compensation liability of the stevedore, since in this Court's view such result represented "the substantial equivalent of contribution." (346 U.S. at 412).

In any event, both *Halcyon* and *Pope & Talbot* represented efforts by this Court to exclude any possibility of conflict of interests between an employee and employer. This approach, insulating the stevedore from all liability where the shipowner was liable to the longshoreman, worked, of course, but had an unwelcome side-effect: negli-

16. See *The Etna*, 138 F.2d 37 (3rd Cir. 1943). But also see *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D.N.Y. 1952) (Weinfeld, J.), aff'd, 205 F.2d 151 (2d Cir. 1953), where the employer's lien on proceeds was justified not only on the basis of prevention of a "double recovery" by a compensated longshoreman as a result of his third-party suit, but by the presumed effect of the 1938 Amendments, cutting-off the employer's right to sue where compensation was paid without an award and thereby depriving the employer of an adequate remedy at law. Hence, the characterization of the stevedore's "lien" as "equitable." See as well, *Bloomer* v. *Liberty Mutual Ins. Co., supra.*

gent stevedores routinely escaped even their compensation liability, thereby imperiling the safety of longshoremen. But the next step in the development of the law of longshoremen's personal injury cases, and with it the maritime law in general, reintroduced the by now familiar "conflict of interests" problem.

In 1956, in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), a case which preferred consideration of the safety of longshoremen to all else, this Court held stevedores liable to shipowners, not for contribution but for indemnity, not on account of and to the extent of concurrent fault, but for breach of warranty of workmanlike service. By making the stevedore potentially liable, not just for part of a longshoreman's damages *(Halcyon)* or, as a minimum, its compensation liability *(Pope & Talbot)*, but for the total amount of the shipowner's liability to the longshoreman (in addition, by extension never sanctioned by this Court, to the shipowner's costs of defense in the way of attorneys' fees), *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.* restored full blown the conflict of interests introduced into the LHWCA by the 1938 Amendment to § 933(b). The practical implications following from this fact were eloquently (and, of course, accurately) described by Mr. Justice Black in his *Ryan* dissent, 350 U.S. at 135-147.

On October 24, 1955, fourteen days after rehearing in *Ryan Stevedoring Co., Inc.*, this Court granted certiorari (350 U.S. 872 (1955)) in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud," supra.* This case had been dismissed in the district court on the basis of the § 933(b) assignment, a formal order awarding compensation having been filed by the deputy commissioner (110 F. Supp. 933 (S.D.N.Y. 1952)). On appeal (223 F.2d 189 (2d Cir. 1955)) the judgment of dismissal was affirmed on grounds of laches, the case having been begun seven years after the occurrence of injury. In that case compensation payment totalled but $160.72.

Before determining the issue of laches to be a question of fact for the jury and therefore requiring reversal on that ground if no other, this Court held that although an assignment had occurred it could not be given effect. This judicial repeal of § 933(b) was justified on grounds that:

> [T]he statute presupposes that the assignee's [stevedore's] interests will not be in conflict with those of the employee . . . [and] where there is such a conflict of interests, the inaction of the assignee operates to defeat the employee's interest in any possible recovery. Since an action by Travellers [the stevedore's compensation insurer] would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally. 351 U.S. at 531.

It is apparent that *Czaplicki* represented the *second* choice of this Court, a cure for a problem which it first tried to avoid by excluding all possibility that a conflict would arise, and an *alternative*[17] means to ensure that the flaw in § 933(b) introduced by virtue of the 1938 Amendments could not be exploited to deprive an injured longshoreman, in days of inadequate compensation benefits, of either his right to compensation or suit against a responsible third-party.

American Stevedores, Inc. v. *Porello; Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.; Pope & Talbot Inc.* v. *Hawn;* and *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud,"* were all correctly decided. Longshoremen formerly desperately needed a right to sue because of the inadequacy

17. The forebearance demonstrated by this Court, in initally declining the option of refusing to enforce an Act of Congress, (§ 933(b)), despite what proved to be irresistable reason to adopt this solution, is a fact properly to be considered in evaluating the Fourth Circuit's lack of any similar restraint in *Caldwell* v. *Ogden Sea Transport, Inc., supra.*

of the compensation remedy. And the right to sue and obtain compensation could not be adequately guaranteed by this Court, except on terms *either* of insulation of the stevedore from *any* liability where a third-party was responsible for an employee's injury; *or* repeal of the imperfectly amended § 933(b) in order to respond to Congress' purpose, identified in *American Stevedores, Inc.* v. *Porello, supra,* as an extension to those covered by the LHWCA of a right to voluntarily paid compensation benefits *and,* where appropriate, damages from a third-party.

But today, *Czaplicki* is not needed. The conflict of interests exception, barring effect to the § 933(b) assignment, is no longer required, by virtue of the combined effect of amendments to § 933(a) and (b) in 1959, and the 1972 Amendments limiting the stevedore's liability to compensation.

The LHWCA was amended in 1959 (73 Stat. 391) to provide that the employee "need not elect," 933(a), and that the employee's third-party right was assigned only after lapse of six months from acceptance of an award without suit, § 933(b). And although the 1972 Amendments (86 Stat. 1262), did not significantly affect § 933(a) or (b), the principal 1972 LHWCA Amendment from the shipowner's perspective, § 905(b), insulated the employer from liability for "such damages" of its injured employee or "anyone otherwise entitled to recover damages" by reason of injury to such employee caused by third-party negligence.

As a result of the 1972 Amendments, concern over any *Halcyon* inspired conflict of interests induced by threat of contribution is surely misplaced; whereas the *Pope & Talbot* concern, that the stevedore might minimize its "contribution" in potential relief of a shipowner's burden of damages and unfairly deprive a longshoreman of compensation by threatening to "force an award," is obviated by the present § 933(b) six month grace period. Of course,

the "conflict of interests" threat created by *Ryan* indemnity (and overcome by *Czaplicki*) is now, too, an historical curiosity. The stevedore has neither motive (by virtue of the 1972 Amendments) nor power (by virtue of the Amendments to § 933 in 1959), to interfere in a longshoreman's suit or attempt to minimize its compensation liability, which can now be made certain without loss of right to sue.

Caldwell v. *Ogden Sea Transport, Inc., supra,* to the extent it "solves" the LHWCA § 933(b) assignment provision/conflict of interests problem does so after the fact. Any supposed conflict of interests presented in these cases today, where an assignment has occurred by provision of § 933(b), is no more than that which existed between 1927 and 1938 under § 933(b) as originally enacted. This is the "conflict" arising from what is thought to be the reluctance of stevedores to sue their shipowner customers (See 12b and *Valentino* v. *Rickners Rhederei,* G.M.B.H., 552 F.2d 466 (2d Cir. 1977)). Indeed, the conflict of interests between employer and employee is now less: the stevedore has vastly more at stake—compensation benefits were most dramatically increased in 1972 and the stevedore is typically the principal beneficiary of the third-party action, whether or not brought before six months of acceptance of an award of compensation.

This enduring "conflict" is, in law, no conflict at all, as it must necessarily be seen to be within the tolerance contemplated by Congress; this "conflict" existed at the beginning and continues, despite amendments to the applicable LHWCA §§ 933(a) and (b) in 1938, 1959 and 1972, no one of which can be read as suggesting repeal of the assignment section.

There may be, however, reason beyond natural reluctance (see *Valentino* v. *Rickners Rhederei, G.M.B.H., supra)* of the stevedore to sue its customers. If stevedores do not

bring § 933(b) actions, assuming that this is so, or will prove true, that fact may demonstrate an additional Fed. R.Civ.P. 17 reason why the longshoremen should not be "revested" with the third-party action upon inaction of the stevedore.[18]

Fed.R.Civ.P. 17 affords a defendant not only "freedom from multiplicity of suits based on the same claim," as the Second Circuit held (7b), but an opportunity to present any evidence or defenses it has against the real party in interest. *Celanese Corp. of America* v. *John Clark Industries, Inc.*, 214 F.2d 551, 556 (5th Cir. 1954); *Virginia Electric & Power Co.* v. *Westinghouse Electric Corp.*, 485 F.2d 78, 84 (4th Cir. 1973). Under *Caldwell* and the view of the Second Circuit Court of Appeals, since both hold that an assignment had occurred, if the stevedore's § 933(b) suit is allowed to revest in the employee a third-party may be deprived of a defense available to it, if no revestiture is

18. The first reason is that the *Caldwell* result ignores the possibility that a longshoreman's personal injury case will be without merit. If mere inaction by the employer "revests" the action in the longshoreman, his employer need not make any ethical or business judgment regarding the merits, or lack thereof, of its employee's claim. Under such a result the stevedores will not have power to prevent prosecution of a third-party claim known to it to be invalid.

A second reason is that there is nothing at all wrong in the stevedore's wishing to discourage, to its initial economic disadvantage, third-party cases against its customers, where an injured employee has been, or can be made, substantially whole by the generous benefits the LHWCA now provides. Such motive comports fully with Congress' intention that longshoremen prefer compensation where appropriate, in order to reduce the cost to the maritime industry of third-party claims, as well as the burden upon the courts such cases have traditionally represented, although "seldom result[ing] in a real increase in actual benefits (sic) for injured workers." See S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 4 (1972). This point has particular force in light of the result sanctioned recently by this Court in *Bloomer* v. *Liberty Mutual Ins. Co.*, *supra*, which makes the longshoreman's first cent of additional recovery by means of his third-party action dependent upon the judgment or settlement being more than half-again greater than compensation benefits already received.

seen to have occurred, and the stevedore force to sue on its § 933(b) assignment.

By virtue of this Court's holding in *Federal Marine Terminals Inc.* v. *Burnside Shipping Co., Ltd., supra, if* the 1972 Amendments to the LHWCA do not, in effect, prevent today the bringing of a suit by the stevedore in its own right against the shipowner, such suit would be subject to the rule of *Halcyon.* But if the longshoreman sues prior to the lapse of six months from an "award" or after the action is revested in him by the stevedore's inaction in failing to sue the shipowner, the stevedore's concurrent negligence is no bar to recovery. In such case, the shipowner would not be allowed by virtue of *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), to assert concurrent stevedore negligence as either a partial or complete defense to a longshoreman's § 905(b) claim. And by virtue of *Pope & Talbot, Inc.* v. *Hawn, supra,* in such suit in the name of the compensated employee, the shipowner would also be unable to assert concurrent negligence in defense to the stevedore's claim of "lien" and, hence, would not be able to reduce its liability to the longshoreman by the amount of the (now subject of being made certain) compensation liability of the stevedore. To the extent that § 933(e)(1)(C) and (D), afford an employer recovery of its common law damages, (compensation paid *and* owed), which the stevedore can, or once could, recover in a *Federal Marine Terminals* v. *Burnside* action subject to the complete defense of its concurring negligence, a stevedore's § 933(b) suit might properly be seen as subject to the same defense. Thus, whether the shipowner is liable to repay to a negligent stevedore its compensation liability, or any part thereof, might be dependent upon who sues. See, *Landon* v. *Lief Hoegh And Co., Inc.,* 521 F.2d 756 (2d Cir. 1975), certiorari sought on other grounds and denied, 423 U.S. 1053 (1976), reh. den. 424 U.S. 935 (1976).

The Fourth Circuit's *Caldwell* "revestiture" holding, *broadening* the *Czaplicki* exception is unsupportable for the following reasons: (1) that the LHWCA originally provided that such right was lost merely by acceptance of any compensation; (2) decisions prior to *Czaplicki* in 1956, for a period of nearly 30 years following the enactment of the LHWCA in 1927, uniformly held that where, on the facts, an assignment had occurred an employee's suit was barred on that basis; (3) *Czaplicki* was not based on any conviction that Congress had had an intention to preserve the third-party claim in all instances, but, rather, that it was necessary to deny effect to such assignment in order to serve Congress' purpose that the employee have both compensation and a right to sue, when a change in law, would have, in effect, withdrawn one or the other entitlement; (4) the substantive third-party right for which the Fourth Circuit Court of Appeals holding reflects such concern, is now of significantly less value to the employee than it was prior to 1972 as a result of the dramatic recent increase in compensation benefits, while the incentive of the employer to sue on the § 933(b) assignment is accordingly greater and that of the employee to prevent an assignment less; and, (5) giving the employee opportunity to show a conflict of interests, as a matter of fact, between himself and his employer is, if anything, more protection than Congress intended, to preserve the third-party rights of an injured longshoreman.

CONCLUSION

The analysis of the issues by the Fourth Circuit Court of Appeals is all but completely erroneous. Proper deference to the 1938 Amendents to LHWCA § 933(b) and to this Court's holding in *American Stevedores, Inc.* v. *Porello, supra,* compels the conclusion that the Fourth Circuit mistakenly viewed mere acceptance of voluntarily paid compensation benefits as sufficient to trigger the statutory six-month time to sue provision. Having erred initially, that court proceeded to achieve a correct result by the only means available, by also failing to understand the reason for so-called "exception" to enforcement of a § 933(b) assignment created by this Court in *Czaplicki* v. *The Vessel "S.S. Hoegh Silvercloud," supra.* The Fourth Circuit failed to perceive why the holding of that case was once so necessary and why it can no longer be justified.

But if anything the most egregious error of the Fourth Circuit Court of Appeals was in failing to appreciate the enormous implications which follow from the fact that the LHWCA, by virtue of the 1972 Amendments, extends today inflation-proof compensation benefits of unprecedented generosity. By virtue of this fact, it is surely not inappropriate for *some* restriction to be placed on the third-party suits, if only to avoid the waste to all concerned in the industry of prosecution of afterthought cases of dubious merit, particularly when, if the employee is encouraged to exhaust his compensation entitlement, suit against a shipowner for "damages" for which he can be made essentially whole through compensation, may be redundant. It is simply inappropriate for courts *now* to rescue third-party cases from the consequences of a longshoreman's inattention at the cost of doing violence to an act of Congress.

There being no petitioner with a proper grievance before the Court, the petition should be denied.

Dated: New York, New York
July 15, 1980

Respectfully submitted,

HOLLIS M. WALKER, JR.
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Respondents

JOSEPH T. STEARNS
SANDRA R. M. GLUCK
Of Counsel

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK JR., CLERK

No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1979

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R. A.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FRANCIS X. BYRN
Attorney for Respondent
One State Street Plaza
New York, New York 10004
(212) 344-6800

JOHN M. TORIELLO
Of Counsel

Questions Presented for Review

1. Were the procedural requirements for assignment under section 33(b) of the Longshoremen's and Harborworkers' Compensation Act (LHWCA) satisfied in this case?

2. Has the particular conflict-of-interest exception to section 33(b) of the LHWCA, as announced by this Court in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), been removed by subsequent Congressional amendments to the LHWCA?

3. Is the conflict-of-interest exception to section 33(b), if any, limited to demonstrated conflicts of interest?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Authorities iii

Citations to the Opinions and Judgments Delivered in the Courts Below iv

Statutes Involved 1

Statement of the Case 1

Reasons for Denying the Petition for a Writ of Certiorari 3

Appendix 1a

Table of Authorities

Cases: PAGE

Caldwell v. *Ogden Sea Transport, Inc.*, Dkt. No. 78-1257 (4th Cir. March 27, 1980) 7, 8

Czaplicki v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956) 3, 4, 5, 6, 7, 9

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 6

Liberty Mutual Ins. Co. v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) 7

McClendon v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965) 5, 7

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978).... 6

Potomac Electric Power Co. (PEPCO) v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) (per curiam) 5

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 4, 5, 6

Sabol v. *Merritt, Chapman & Scott Corp.*, 241 F.2d 765 (2d Cir. 1957) 4

Toomey v. *Waterman S.S. Corp.*, 123 F.2d 718 (2d Cir. 1941) 7

Statutes:

33 U.S.C. §933(b) 4

33 U.S.C. §905(b) 5

F.R.Civ.P. 17(a) 9n

20 C.F.R. §702.311-.315 (1976) 1

S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) 8, 9

Citations to the Opinions and Judgments Delivered in the Courts Below

The decision of the Court of Appeals in *Rodriguez* v. *Compass Shipping Co., Ltd.*, is reported at 617 F.2d 955 (2d Cir. 1980). The decision of the Court of Appeals in *Barulec* v. *Ove Skou, R.A.* is included as Appendix C in the Petitioner's Supplemental Appendix to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Southern District of New York in *Barulec* v. *Ove Skou, R.A.*, is reported at 471 F. Supp. 358 (S.D. N.Y. 1979) and the opinion and decision on defendant's renewed motion to dismiss is contained in the Appendix to this Brief in Opposition.

No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1979

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R. A.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statutes Involved

In addition to section 33(b) of the LHWCA, which is quoted at page 4 of the Petition for a Writ of Certiorari, 20 C.F.R. §§ 702.311-.315 (1976) are involved in this action. As noted by the Second Circuit, these regulations were amended on September 9, 1977, after all relevant events in this lawsuit (9b).*

Statement of the Case

This action was commenced by the filing of a Complaint in the United States District Court for the Southern District of New York on February 22, 1978. Petitioner sought

---

* Numbers with letters following, refer to pages in the respective appendices to the Petition for a Writ of Certiorari.

to recover damages for injuries allegedly sustained on January 6, 1975, while working as a longshoreman in the employ of Universal Maritime Service Corp.

Petitioner filed a claim for all benefits to which he was entitled under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) for the injuries allegedly sustained on January 6, 1975. Compensation was paid voluntarily by the employer's insurer from January 10, 1975 until March 14, 1975. On March 25, 1975, a claim for additional compensation was made by the petitioner's compensation representative and a conference in the matter was requested at that time, as well as in later letters of August 18, 1975 and December 22, 1975.

Pursuant to these requests, a conference was held on February 11, 1976 before the United States Department of Labor, Office of Workers' Compensation Programs, at which time a settlement of the claim was reached. This conference was convened, pursuant to administrative regulations, by a claims examiner and was attended by the Petitioner, his representative, the compensation insurer's representative and the claims examiner. The agreement reached at the conference was memorialized in a Memorandum of Informal Conference dated February 11, 1976. Payment of compensation in accordance with this Memorandum was made by the compensation insurance company and notice of this payment was given to the United States Department of Labor on February 13, 1976.

Petitioner does not dispute that he accepted compensation under the Memorandum dated February 11, 1976, more than one year after the date of the claimed accident, and did not commence suit in this matter until February 22, 1978, more than two years after the date of the award and more than three years after the date of the accident.

Defendant moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the complaint of the plaintiff. This motion was denied without prejudice to renewal after 45 days, to allow the Petitioner to present evidence of an actual conflict of interest between the employer's insurer and the Petitioner. The motion for summary judgment was renewed and upon plaintiff's failure to present evidence tending to show that a conflict of interest existed, the Court, by endorsement, granted the motion. On appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court for the reasons stated in the case, *Rodriguez* v. *Compass Shipping Co., Ltd.,* 617 F.2d 955 (2d Cir. 1980).

Reasons for Denying the Petition for a Writ of Certiorari

Petitioner asserts that a writ of certiorari should be granted because of a conflict between the Circuit Courts, a conflict between *Rodriguez* and the decision in *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956), and a conflict between *Rodriguez* and the purposes of the Act.* It is submitted that such conflicts either do not exist or are of such minimal importance as not to require review by this Court.

---

* Almost as an afterthought, petitioner also contends, at page 18 of the petition, that the Second Circuit misconstrued the applicable administrative regulations. Petitioner, however, confuses the regulations which were in effect when Petitioner's compensation claim was resolved with regulations which did not take effect until September 9, 1977 (4b-5b, 9b-11b). Indeed, the limited time frame within which the applicable regulations were in effect, *viz.* 1972-1977, is a further reason for this Court to deny the Petition. The Second Circuit noted that the new regulations were not before it for review and expressly declined to determine the effect of these new regulations (9b n.1, 10b n.2).

In *Czaplicki,* this Court succinctly summarized its holding as follows:

> "Since an action by Travelers would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. *In this circumstance,* we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally." 351 U.S. at 531 [emphasis supplied]

Travelers was the workmen's compensation insurer for Northern Dock Company, the employer of Czaplicki, as well as the insurer of Hamilton Marine Contracting Company which, along with the vessel owner and operator, had been sued by Czaplicki in a third party action brought under the LHWCA. By reason of the statutory assignment provided in the LHWCA, 33 U.S.C. §933(b), Travelers was also the proper statutory party to bring suit on behalf of Czaplicki. Because Travelers insured Hamilton Marine Contracting Company, one of the third parties subject to suit both by the plaintiff, under traditional negligence principles, and by the owner and operator of the vessel, pursuant to *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956), this Court concluded that Czaplicki's rights of action "were held by the party most likely to suffer were the rights of action to be successfully enforced." 351 U.S. at 530. This Court held that the section 33(b) assignment would be precluded only where the statutory assignee would, by pressing the assignor's claim, subject itself to suit either under traditional negligence principles or pursuant to the indemnity doctrine announced in *Ryan Stevedoring Co., supra.* 351 U.S. at 530-33; *Sabol* v. *Merritt, Chapman & Scott Corp.,* 241 F.2d 765 (2d Cir. 1957). As the *Czaplicki* Court explained:

> "Czaplicki can bring this suit not because there has been no assignment, but *because in the peculiar facts here* there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action." 351 U.S. at 532-33 [emphasis supplied]

Following this reasoning, the Courts of Appeals in *McClendon* v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965), *Potomac Electric Power Co. (PEPCO)* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) (per curiam) and *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958), essentially held that in the common situation where the assignee would be subject to an indemnity suit under *Ryan, supra*, a presumption of a conflict of interest would arise. The Courts explained that there were essentially two possible reasons for the employer's inaction. First, fear that indemnity under *Ryan* would be sought in an amount far greater than the workmen's compensation liability, or a good faith belief that plaintiff's cause of action was not meritorious. Because of the difficulty in proving which of these motives prevailed and following the rationale of *Czaplicki*, these Courts held that the spectre of an indemnity suit against the assignee was sufficient to find a conflict of interest, which together with inaction, would allow the assignor to proceed with the third party suit in his own name.

As a result of the 1972 Amendments to the LHWCA, the most common ground for a finding of conflict of interest prior to the amendments was abolished. Thus, among other things, Congress legislatively overruled *Ryan Stevedoring Co., supra*, by enacting section 5(b) of the LHWCA, 33 U.S.C. §905(b). This section, in pertinent part, reads as follows:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such

> person, . . . may bring an action against such vessel as a third party in accordance with the provisions of Section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . ."

This section has had two significant effects on the issues presented in the Petition for a Writ of Certiorari. First, and perhaps most importantly, Congress reaffirmed that any actions against vessels as third parties must be brought "in accordance with the provisions of Section 33." Among the provisions of Section 33 is, of course, the second subsection, which provides for the assignment of a cause of action six months after the payment of compensation under an award in a compensation order. Thus, Congress in 1972, reaffirmed its consistent policy determination that third party causes of action should be assigned to the employer six months after the acceptance of compensation under an award in a compensation order. As was recently held by this Court in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), a decision involving a Congressional policy determination under the Death on the High Seas Act, Congress' choice must be given proper deference by the judiciary in applying legislation.

The second significant effect that this provision has had is the removal of the conflict of interest normally found between a stevedore and its employee with regard to third party suits against a vessel. It was the *Ryan* indemnity suit which *Czaplicki* and its progeny cited as justification for the avoidance of the plain words of the statute. It is this very same indemnity suit which section 5(b) has done away with, *see Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Without such a

conflict of interest, the Second Circuit's rationale in *Rodriguez* is entirely correct and, in fact, in full accordance with this Court's rationale in *Czaplicki* as well as the rationales put forth by the Circuit Courts in *Johnson, supra, PEPCO, supra,* and *McClendon, supra.*

The only case with which an arguable conflict may exist is *Caldwell* v. *Ogden Sea Transport Inc.,* Dkt. No. 78-1257 (4th Cir. March 27, 1980). The Fourth Circuit, in part, held that following the expiration of the six-month period after an award, a cause of action will "revest" in the longshoremen if the statutory assignee, for whatever reason, declines to bring suit. Of course, under *Rodriguez,* the statutory assignment will only be avoided when, as in *Czaplicki, supra,* an actual conflict of interest exists.

The difference between these two opinions, however, is more cosmetic than real. Neither decision extinguishes the negligence liability of a vessel under the Act. Both decisions agree that the statutory requirement of an "award in a compensation order" may be satisfied by informal, as well as formal, actions, citing *Toomey* v. *Waterman S.S. Corp.,* 123 F.2d 718 (2d Cir. 1941) and *Liberty Mutual Ins. Co.* v. *Ameta & Co.,* 564 F.2d 1097 (4th Cir. 1977). And both decisions recognize that section 33(b) permits one party, either the longshoreman or the employer, to enforce the vessel's negligence liability. *Rodriguez* only requires the longshoreman to decide within six months *after an award* whether to commence suit against a vessel. Thereafter, the decision whether to commence suit and the control of the lawsuit is, in accordance with section 33(b), given to the employer or the employer's workmen's compensation insurer. Unless an actual conflict of interest is proven, the employer or the employer's insurer is then permitted to weigh the merits of the case to determine whether there was negli-

gence, of the vessel which was a substantial factor in causing the longshoreman's claimed injury.

Notably, in this case the award was not filed until more than a year after the accident and, therefore, petitioner's time to commence a lawsuit under section 33(b) did not expire until more than 18 months after the accident. It was thereafter the employer's insurer's prerogative to commence a lawsuit. It is anticipated that as a result of both the *Rodriguez* and *Caldwell* decisions, actions in both Circuits will only be commenced in a more timely fashion.

Petitioner finally asserts that the decision in *Rodriguez* conflicts with the Congressional intent to do away with indemnity from the stevedore to the shipowner, to husband the stevedore's resources, and to establish negligence liability for the shipowner.

As already noted above, neither *Rodriguez* nor *Caldwell* extinguish the negligence liability of the vessel. So too, neither opinion has anything whatsoever to do with requiring indemnity from a stevedore to a vessel. In 1972, Congress did intend to conserve resources, but it intended to do so as to the resources of all parties, including vessels*, so that the vast improvement in compensation benefits effected by the amendments could be financed by these savings. S. Rep. No. 1125, 92d Cong., 2d Sess. 9 (1972). Congress envisioned the restriction of third party litigation under the LHWCA as the means to accomplish this savings. *Id.* Thus, the longshoreman's remedies were broadened in compensation but restricted in third party litigation under the 1972 amendments.

It would seem that petitioner's real concern is that review by employers and workmen's compensation insur-

---

* It is the vessel's resources which are ultimately taxed by the LHWCA since the stevedore's compensation costs are passed on to customers in the stevedore's rates.

ers may reduce the number of lawsuits commenced as a result of longshoremen's accidents. Should this review assist in the disposition of longshoremen's personal injury suits which lack merit or are of questionable merit, the Congressional intent underlying the 1972 Amendments would be furthered. As the Senate Committee noted with regard to third party suits prior to 1972,

> "The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services has seldom resulted in a real increase in actual benefits for injured workers." S. Rep. No. 1125, 92d Cong., 2d Sess. 4 (1972).

Clearly, in 1972 Congress made an important policy determination that longshoremen's remedies should be more closely covered by workmen's compensation benefits rather than by burdensome and ultimately ineffective litigation*. Such a restriction is intended to place the cost of accidents on employers except in those situations where a vessel's negligence substantially contributed to the happening of the accident. This restriction of litigation was in turn intended to husband the resources of both shipowner and stevedore to finance the vast improvement in compensation benefits provided by the amendments.

The decision in *Rodriguez* does not, therefore, conflict with this Court's decision in *Czaplicki,* nor with the Congressional purposes underlying the enactment of the 1972 amendments to the LHWCA. The Second Circuit's analysis and conclusion is also in accord with the vast majority of decisions which have been rendered on this subject.

---

*Of course, petitioner's suggestion that the vessel's proper remedy would be to join the employer under F.R.Civ.P. 17(a) would only cause additional litigation and thus defeat the expressed intent of Congress in enacting the 1972 Amendments.

Under all decisions on this subject, including *Rodriguez,* the negligence liability of a vessel is not extinguished. *Rodriguez* simply follows Congress' policy determination that, absent an actual conflict of interest, third party actions are assigned to the employer or the employer's insurer six months after receipt of compensation under an award.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that a Writ of Certiorari should not issue to review the decision below.

Respectfully submitted,

FRANCIS X. BYRN
Attorney for Respondent

JOHN M. TORIELLO
Of Counsel

APPENDIX

Endorsement

SRECKO BARULEC, *Plaintiff*, v. OVE SKOU, R.A., *Defendant.*

78 Civ. 786

LASKER, D.J.

By Memorandum Opinion dated May 31, 1979, the plaintiff in this action was given forty-five days within which to submit competent evidence establishing a conflict between his interests and those of his employer sufficient to bring his case within the exception to the mandate of 33 U.S.C. § 933(b) created in *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956). The defendant was given leave to renew its motion for summary judgment dismissing this action on the grounds that the plaintiff's cause of action has been assigned to his employer pursuant to section 933(b) after forty-five days.

Plaintiff did not submit any evidence within the allotted forty-five days, and the defendant now renews its motion. In opposition, plaintiff still has not submitted any evidence tending to show that a real conflict of interest exists, but seeks instead to reargue the issues disposed of on defendant's prior motion. Plaintiff is not entitled to a "second bite of the apple," and should address its arguments to the Court of Appeals.

Accordingly, for the reasons stated in our opinion of May 31, 1979 in this case and in our opinion in *Perez* v. *Arya National Shipping Line, Ltd.,* 468 F.Supp. 799 (S.D.N.Y. 1979), the defendant's motion for summary judgment dismissing this action is granted.

It is so ordered.

Dated: New York, New York
August 8, 1979

MORRIS E. LASKER
U.S.D.J.

No. 79-1977

Supreme Court, U. S.
FILED
NOV 19 1980
ODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R. A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

MORRIS CIZNER
Attorney for Petitioners
160 Broadway
New York, N. Y. 10038
(212) 227-1350

Questions Presented for Review

1. When there is a statutory assignment to an employer of the right to bring a third party action under Section 33(b) of 33 U.S.C. 933(b) and the employer fails or refuses to prosecute the third party action, does such failure constitute a waiver of the employer's rights under the assignment and is the right to sue deemed reassigned to the injured workman?

2. Where there is a conflict of interest between the employer and employee, and the employer fails or refuses to sue a third party for its negligence do equitable considerations require that the Act be interpreted so as to permit the injured workman to sue the third party even though more than six months elapses from the date of payment of an award in a compensation order?

3. Are the applicable purposes of the Statute 33 U.S.C. 901 *et seq.* for the employer to recoup its loss occasioned by the payment of compensation and for the injured employee to have the right to sue a negligent third party for damages and should such purposes be considered in interpreting the Act; should such purposes be considered in judging the harshness of depriving the injured workman of his right to sue and to benefit the negligent third party?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

I. Applicable Statutes 2

II. Statement of the Case 3

III. Statement of Facts 5

IV. The Decision in Rodriguez 6

V. Summary of Argument 7

VI. ARGUMENT 9

A. The purposes of the Act are to benefit the longshoremen, to promote safety and for Stevedore to recoup its payments 9

B. Czaplicki Rule—the Assignee has control over the right of action but the Statute presupposes assignees interest will not be in conflict with those of Employee. Where there is a conflict of interest and inaction by assignee-employer as here, the employee should be allowed to sue 11

C. Potomac Electric Co. v. Wynn, Jr., the law in effect in 1972, relies on the purposes of the act to hold that the employee may bring suit against the third party whenver it is evident that the employer, for whatever reason, does not intend to bring suit 17

PAGE

D. *Edmonds* v. *Compagnie Generale Transatlantique* holds

1. In 1972 Congress did not intend any change in the then existing law pertaining to the effect of the statutory assignment under sec. 933(b);

2. The applicable law is a combination of statutory and judicially created law and under the circumstances courts are not free to change judicially created law 23

E. *Rodriguez* creates a harsh result contrary to congressional intent 25

F. *Rodriguez* holding is against public policy since it provides for contribution to Shipowner by Stevedore, at the latter's expense 27

G. *Caldwell* v. *Ogden Sea Transport Inc.* is consistent with Congressional intent, the purposes of the Act and the unrestricted application of the Czaplicki Rule 32

VII. Conclusion 34

Table of Authorities

Cases:

Bandy v. *Bank Line, Ltd.*, 442 F. Supp. 882 (E.D. Va. 1977) 17

Cella v. *Parternreederi M.S. Ravenna*, 529 F.2d 15 (1 Cir. 1975) 11

Czaplicki v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956) ..... *passim*

PAGE

De Los Santos v. *Scindia Steam Navigation Co., Ltd.*, 598 F.2d 480 (9 Cir. 1979) 10
Dodge v. *Mitsui*, 528 F.2d 669 (9 Cir. 1975) 29, 30

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 14, 16, 21, 24, 26

Johnson v. *A/S Ivarans Rederi*, 613 F.2d 334 (1 Cir. 1980) 9
Joyner v. *F&B Enterprises Inc.*, 448 F.2d 1185 (D. of C. Cir. 1971) 20

Lopez v. *A/S D/S Svendborg and D/S of 1912*, 581 F.2d 319 (2 Cir. 1978) 27, 28, 29

Northeast Marine Terminal Co., Inc. v. *Caputo*, 432 U.S. 249 (1977) 16, 33

Potomac Electric Power Co. (PEPCO) v. *Wynn, Jr.*, 343 F.2d 295 (D.C. Cir. 1965) 17, 18
Potomac Electric Power Co. v. *Wynn, Jr.*, 434 F.2d 295 (D. C. Cir. 1965) 7, 23

Samuels v. *Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5 Cir. 1978) 10

Valentino v. *Rickners Rhederei G.M.B.H., SS ETHA*, 552 F.2d 446 (2d Cir. 1977) 6

Other Authorities:

Senate Report No. 92-1125 9

Senate Committee Report 92-1125 20

PAGE

Statutes:

The Longshoremen's and Harbor Workers' Compensation Act,

28 U.S.C. 1254(e) ..... *passim*

33 U.S.C. 901 *et seq.* ..... *passim*

33 U.S.C. 933(b) ..... *passim*

33 U.S.C. 933(e) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1977

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R. A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

I.

Applicable Statutes

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933(b):

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *or Board* shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. 933(e):

> (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner *or Board*);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 7;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the

amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any such finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

II.

Statement of the Case

Rodriguez v. *Compass Shipping* is one of a group of cases in which a longshoreman brings an action to recover damages for personal injuries sustained on board shipowner's vessel due to the negligence of the shipowner. Claim was also made for Workmen's Compensation benefits.

In *Rodriguez* the accident occurred September 4, 1973. On November 4, 1974 the parties in the compensation case settled the claim at an informal conference before a claims examiner.

The agreement was set forth in a U. S. Department of Labor form and signed by the Claims Examiner and the parties. Payment of the agreed upon amount was promptly made.

On July 2, 1977 the action to recover damages was commenced against shipowner and bare-boat charterer by plaintiff Rodriguez.

In *Perez* v. *Arya National Shipping Line, Ltd.*, the accident occurred August 30, 1973. A compensation order was

entered on March 24, 1975 and on July 7, 1976 action was commenced against shipowner by Perez.

In *Barulec* v. *Ove Skou R.A.*, the accident occurred on January 6, 1975. A Memorandum of Informal Conference was prepared and signed by the claims examiner on February 11, 1976, and action was commenced February 22, 1978 by Barulec.

In all three cases the employer did not commence an action against shipowner.

In all cases defendants moved for summary judgment based on plaintiff's failure to sue within six months of the "settlement agreement" as allegedly required by 33 U.S.C. § 933(b).

Such motions were granted and the various Petitioners filed a timely Notice of Appeal.

The Opinions of the District Courts in these cases are not officially reported except *Perez* v. *Arya National Shipping* is reported at 468 F.Sup. 799 and the Opinions of the lower courts are set forth in the Supplemental Appendix to the Petition, pages 1e, 1f, 1g.

At the time of the argument of the appeal in the *Rodriguez* v. *Compass Shipping Co. Ltd.* case, in the Court of Appeals, Second Circuit, the Petitioners' Luis Perez and Srecko Barulec appeals as well as two other appeals entitled *Juan Hernandez* v. *Costa Armatori, S.P.A., "PIA COSTA"* and *Leonard DiFazio* v. *Jugoslavenska Linijska Plovidba "VISE VICA"* were consolidated for the purpose of arguing the appeals together since they all involved the same questions of law. The judgments of the District Courts with respect to all cases were affirmed for reasons stated in the *Rodriguez* v. *Compass Shipping Co. Ltd.* case. Judgments to that effect were entered by the Circuit Court on March 19, 1980.

The Opinion of the Court of Appeals in *Rodriguez* v. *Compass Shipping Co. Ltd.* and *Djakarta Lloyd, P.N.* is officially reported at 617 F.2d 955 and was made a part of the Appendix B to the Petition. The Opinion of the United States Court of Appeals for the Fourth Circuit in the case of *Caldwell* v. *Ogden Sea Transport, Inc.* decided March 27, 1980 is not yet officially reported. Pertinent portions of said *Caldwell* Opinion are printed in the Appendix A to the Petition.

The judgments of the United States Court of Appeals for the Second Circuit were entered on March 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Diversity of citizenship and damages exceeding the jurisdictional amount were the bases for Federal jurisdiction in the court of first instance.

III.

Statement of Facts

The pertinent facts on this appeal are that plaintiff Rodriguez, a longshoreman (as were the other petitioners), was injured and received workman's compensation benefits. The Circuit Court found that payments of such benefits were made pursuant to an award as referred to in 33 U.S.C. 933(b).

More than six months after such award plaintiff commenced an action against shipowner to recover damages for personal injuries sustained due to their negligence.

The employer-stevedore as assignee did not bring a third party action against the defendants. Shipowner claimed that pursuant to said Section 933(b) the plaintiffs claim was assigned to the stevedore six months after the award and hence plaintiff was not the proper party to be suing.

Plaintiff claimed that there was a conflict of interest between employer and employee and economically the stevedores do not wish to antagonize shipowners, their customers. Therefore, none of the stevedores ever sued the shipowner. It was also claimed that equitable consideration as well as the conflict of interest created an exception to the statutory assignment provision of the Act.

An attorney's affidavit was submitted to the lower court on the question of conflict of interest relating that the Vice President of International Terminal Operating Co., Albert P. Cerrachio, has advised that "as a matter of company policy ITO did not in the past bring, maintain and/or assume the prosecution of any action against a shipowner. Mr. Cerrachio, although pressed to do so, declined to make further comment." (J.A. 63a). ITO was plaintiff's Rodriguez employer.

IV.

The Decision in Rodriguez

The Court of Appeal refused to apply the equitable principles set forth in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956).

The Court held however that *"the employee has an interest conflicting with that of the employer, which often chooses not to antagonize its customer, the shipowner, by bringing a law suit against it. See Valentino* v. *Rickners Rhederei G.M.B.H.*, 552 F.2d 446 (2d Cir. 1977)" (12b). Despite such a finding of a conflict of interest they chose to limit *Czaplicki* to the unique fact situation there presented and refused to apply its equitable principles.

In *Valentino* v. *Rickners Rhederei G.M.B.H., SS ETHA*, 552 F.2d 466 (2 Cir. 1977), the Court stated the following:

"At oral argument, both parties stated that stevedores do not, as a practical manner, pursue these law suits —presumably for fear of antagonizing their customers.

• • •

Thus, Appellant asks us to sacrifice the actual rights of longshoremen and their lawyers to the theoretical possibility that they might elect to press such claims at such time in the future. We refuse to do this." 469.

V.

Summary of Argument

1. Under 33 U.S.C. Sections 933(b) and (e), equitable considerations here require the Statute be interpreted so that injured workmen be permitted to sue shipowners:

a) Since the statutory assignment never became effective because of the absence of the condition precedent of "no conflict of interest". (*Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 527).

b) Since in equity there was a waiver by stevedore of its rights by its failure to sue and there is a reassignment of such rights to the injured longshoreman.

c) Since the failure of stevedore to sue frustrates the purpose of the Act and injured workmen may sue no matter what the reason for such failure. (*Potomac Electric Power Co.* v. *Wynn, Jr.,* 434 F.2d 295 (D. C. Cir. 1965)).

2. The position taken by the Second Circuit here is against public policy, with a harsh result, in violation of the intent of Congress and the purpose of said Section 933 in that:

(a) It helps the shipowner to avoid its liability for its negligence and eliminates the incentive for shipowner to exercise reasonable care to provide a safe place to work.

(b) It deprives the employee of a substantial right to a recovery against shipowner for its negligence.

(c) Indirectly it will permit the stevedore to pay compensation for an injury without receiving repayment of its lien for such expenditure. Since shipowner pays nothing the stevedore is in effect contributing to or indemnifying shipowner—to stevedore's detriment and with a major loss to the employee.

(d) Part of the scheme and purposes of the 1972 Amendment to the Act was to provide for the stevedoring company husbanding its resources to be able to provide greater benefits to longshoremen. By not recovering its lien, stevedore is depleting its resources to the benefit of shipowner and the detriment of longshoremen.

(e) The statute was made for the benefit of longshoremen and not for shipowners. In view of stevedore's refusal to act, it will result in a contravention of the purposes of the Act—namely, shipowner will benefit and longshoremen will not.

(f) The economic power of the steamship company will have overcome the stevedore's best interests leaving them without reimbursement for their lien and depriving the longshoreman of that which is in his best interest and which he is entitled to.

VI.

ARGUMENT

A. *The purposes of the Act are to benefit the longshoremen, to promote safety and for Stevedore to recoup its payments.*

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq. is a remedial statute enacted for the benefit of longshoremen, their safety and welfare. The purposes of the Act are not to benefit the shipowners. The purposes, and in particular as they pertain to the 1972 Amendments thereto have been variously set forth as follows:—

The Senate Report No. 92-1125 sets forth the objective of the 1972 Amendments to the Act as "It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such heavy toll upon workers' lives and bodies in this industry—" (p. 2). Basing the liability of vessels as third parties on negligence is "—fully consistent with the objective of protecting the health and safety of employees who work on board vessels." (p. 10) Also, "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work." (p. 10)

In *Johnson* v. *A/S Ivarans Rederi,* 613 F.2d 334 (1 Cir. 1980), the Court stated that "the overriding purpose of the 1972 Amendments was to create incentives for safety in the nation's second most dangerous profession." (339). The Court also said:

> "Finally, standards developed to implement Section 905(b) must reflect the fact that the LHWCA is a remedial statute enacted to protect the longshoreman

> and not the vessel. Doubt as to the interpretation of the Act and the development of standards of care implementing it must be resolved in favor of the longshoremen. See Edmonds v. Compagnie Generale Transatlantique, —— U.S. ——, 99 S. Ct. 2753, 61 L.Ed. 2d 521 (1979)." (347-348)

In *De Los Santos* v. *Scindia Steam Navigation Co., Ltd.*, 598 F.2d 480 (9 Cir. 1979), the Court stated that with respect to the 1972 Amendments:

> First, Congress was concerned about safety. The Senate Committee on Labor and Public Welfare protested that longshoring had an injury frequency rate "well over four times the average for manufacturing operations," and called for safer working conditions when it insisted that "every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies. . . ." Senate Report at 2. The Amendments sought to strengthen economic incentives "to provide the fullest measure of on-the-job safety." House Report at 4699. The higher compensation benefits were meant to "assure that the employer bears the cost of unsafe conditions." Senate Report at 2. "Permitting actions against the vessel based on negligence" was meant to "meet the objective of encouraging safety." House Report at 4704. (484)

In *Samuels* v. *Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5 Cir., 1978), the Circuit Court stated that the fundamental congressional aims in 1972 were two-fold:

> 1) To eliminate the unseaworthiness action but leave a negligence action with promotion of shipboard safety as a primary focus, and

2) To eliminate any form of shipowner's attempt to shift liability in whole or in part, directly or indirectly, to the stevedore.

The Statute provides for a statutory assignment of an injured employee's right to sue a third party six months after an award in a compensation order where he fails to sue during that period of time. It provides for an incentive to the employer to sue the third party to the extent of retaining, out of the recovery, not only its compensation lien plus attorney's fees and expenses, but also 20% of the sum collected. The employee retains the economic benefit to the balance of the recovery. 33 U.S.C. Sec. 933(b) and (e).

The Statute fails, however, to provide for the eventuality should the employer fail to sue.

Until the 1972 Amendments to the L.H.W.C.A., 33 U.S.C. 901 *et seq.*, the courts generally permitted employees to sue the third party after the six month period from the date of a compensation order on the theory of conflict of interest between the employer and employee.

In *Cella* v. *Parternreederi M.S. Ravenna*, 529 F.2d 15 (1 Cir. 1975) the Circuit Court stated the sense of the statutory purpose to be:

> "—to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act." (20)

B. *Czaplicki Rule—the Assignee has control over the right of action but the Statute presupposes assignees interest will not be in conflict with those of Employee. Where there is a conflict of interest and inaction by assignee-employer as here, the employee should be allowed to sue.*

The Supreme Court in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), stated that in a very real sense

the injured employee has an interest in his right of action even after it has been assigned; that normally the employee's interest would not be inconsistent with that of the assignee who would want to recoup the payments made in compensation.

> "Since the assignee's right to recoup comes before the employee's interest, and because the assignee is likely to be in a better position to prosecute any claims against a third party, control over the right of action is given to the assignee . . ." (531)
>
> "In giving the assignee exclusive control over the right of action, however, we think that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interest, the inaction of the assignee operates to defeat the employee's interest in any possible recovery." (531)

In such circumstances, the Court stated that the Statute should be construed to allow the employee to enforce, in his own name, the rights of action that were his originally. Where there is a conflict of interest and inaction by the assignee, the employee should be allowed to sue since that is the proper way to insure him the rights given by the compensation act, namely, to secure his statutory share in the proceeds of any action.

In *Czaplicki,* the Court held that the plaintiff could bring the suit not because there had been no assignment, but because there was no other procedure by which plaintiff could secure his statutory share in the proceeds of his right of action. In the concurring opinion of Justice Frankfurter

there is set forth that the assignee employer holds the claim against the tortfeasor for the benefit of the employee so far as it is not necessary for his own recoupment. Thus although the statute gives the assignee the power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest.

The Second Circuit in *Rodriguez* recognized that in *Czaplicki,* on the facts there presented the Supreme Court understandably held that the conflict of interest was sufficient to nullify the assignment. The Court also stated that the employer, unlike its employee had no interest in pressing the claim. The Court found that the state of affairs changed in 1959 and the problem further alleviated in 1972. It further stated "Moreover had Congress desired when it amended the Act to give both the employee and employer the right concurrently to sue the shipowner, nothing prevented it from doing so. Instead, it chose to give the employee six months within which to bring such suit and if the employee failed to do so within that period to assign the right exclusively to the employer." (p. 13b Petition for Writ)

The Circuit Court found that the 1959 change in Section 33(b) of the Act which provides for an assignment six months after an award justified the restrictive application of *Czaplicki.* The Court overlooked the fact that after 1959 and until the lower Court's decision in *Rodriguez,* the Courts generally permitted the longshoremen to sue shipowner even after the six month period. There is no basis for the court's view in this respect.

The Second Circuit also claimed Congress, in 1972, eliminated any employer's liability to a shipowner. It viewed this as an alleviation of the problems arising from conflicts of interest as dealt with in *Czaplicki.* It therefore

concluded that the injured longshoreman's right was restricted in his right to recover damages against shipowner for his negligence, contrary to Congressional intent. The law as it existed in 1972 at the time of the amendment to the Act permitted the longshoremen to sue shipowner regardless of there being a compensation order and the passage of the six month period of time thereafter. *Czaplicki* is judge-made law. Congress could not anticipate the Court changing this. The reasoning of the Second Circuit in this respect is contrary to that which is set forth in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

The Circuit Court confuses concurrent right to sue with the *Czaplicki* case. Where there is a concurrent right both stevedore-employer and the injured employee have the right to sue. *Czaplicki* proceeds on the theory that the statute grant an exclusive right to the assignee to *control* the third-party case. What the Supreme Court said there was that such assignment presupposes that there is no conflict of interest. Thus, whether there is exclusivity or not, a condition precedent to the effectiveness of the assignment is that there is no conflict of interest. Here, in our case, there is such conflict.

If the Second Circuit could justify to itself the application of the *Czaplicki* rule to the facts in that case then consistency requires that the assignment provision cease to be effective when there is a conflict of interest affecting the purposes of the Act.

The Statute does not state that six months after receipt of payment under a compensation order the steamship company cannot be sued. This is not a statute of limitations. Shipowner is not relieved of liability after the six-month period for the consequences of its negligence. The statutory assignment is merely an assignment of control

of plaintiff's cause of action. Plaintiff continues to have a real and financial interest in the cause of action. In *Rodriguez,* the Second Circuit recognized that by reason of shipowner's economic control over stevedore no action would be taken. Thus, shipowner has gotten control of plaintiff's cause of action. As for the stevedores, their failure to sue and prosecute the claim is not acting as Congress intended them to. They are not "controlling" the cause of action as contemplated in the Statute. The purpose of control is recoupment, not the relieving of shipowner of its responsibility. Their failure to act is defeating plaintiff's right to damages for shipowner's negligence. Stevedore has an obligation to prosecute the action. The inequity involved here is obvious and was never within the contemplation of Congress nor consistent with the purposes of the Act.

The rule enunciated in *Czaplicki* is directly applicable to our case and yet the Second Circuit has refused to apply it. In *Rodriguez* the Court found a conflict of interest and acknowledged the Supreme Court's reason for the *Czaplicki* rule. The Court, however, limited the rule to the facts of that case. It refused to apply the rule to any other fact situation and would not follow the law as reasoned and interpreted in that case. Thus, the Second Circuit is now changing the case law and is so interpreting the Act and *Czaplicki* as to:

1. Make a Statute of Limitations out of Section 933(b) of the Act with an absolute assignment thereunder to the detriment of plaintiff and stevedore and for the benefit of shipowner.

2. Deprive the injured longshoreman of his right to his share of the proceeds of the third party action when

brought by stevedore (See Section 933(e)) since no action is brought.

3. Reduce the time exposure of shipowner to a law suit for damages for its negligence and in that fashion reduce the incentive for shipowner to promote safety on board ship.

4. Permit economic pressure by shipowner to stop stevedore from suing and so lose their right to recoupment.

Indicative of the error in the Circuit Court's approach to the problem is its statement that the employee has an interest conflicting with that of the employer. In view of the purposes of the Act it would be more to the point and correct in approach if the Court had stated that the employer's interest conflicts with that of the employee or simply that a conflict existed between them. See *Czaplicki* (statute presupposes "the assignee's interest will not be in conflict with those of the employee". p. 531)

The Second Circuit strictly limited an employee's right to sue to a period of six months. They ignored the purposes of the Act and that the L.H.W.C.A. should be interpreted broadly in favor of the injured longshoreman who should be permitted to prove his case against the shipowner to recover damages against him arising out of the latter's negligence or fault. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) and *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977). The Second Circuit chose instead a narrow statutory construction thereby defeating an injured employee's rights to the benefits he is entitled to under the act; relieving shipowner of its responsibility for the results of its negligence; and shifting to plaintiff, the burden of a loss occasioned by the fault of shipowner.

C. Potomac Electric Co. v. Wynn, Jr., *the law in effect in 1972, relies on the purposes of the act to hold that the employee may bring suit against the third party whenever it is evident that the employer, for whatever reason, does not intend to bring suit.*

The Circuit Court was in error in refusing to follow *Potomac Electric Power Co. (PEPCO)* v. *Wynn, Jr.*, 343 F.2d 295 (D.C. Cir. 1965). In that case the Court held that although payment was made pursuant to a compensation order and more than six months elapsed from the date of payment, the employee was still permitted to bring suit when it was clear that the employer, for whatever reason, would not bring suit.

The District Court below here chose instead to follow *Bandy* v. *Bank Line, Ltd.*, 442 F. Supp. 882 (E.D. Va. 1977) (cited by the 2nd Circuit as authority) placing the burden of proving a conflict of interest between employer and employee on the employee to overcome the statutory assignment referred to in 33 U.S.C. 933(b). It justified such position by asserting that such was Congressional intent. It is submitted that the Court was in error.

The Bandy Court set forth two purposes for the assignment; (1) to enable the employer to control the potential suit by which the employer may recoup the sums expended as compensation payments and (2) to permit the interested party with the greater financial and legal resources to prosecute the claim for the benefit of both the employer and the employee.

Obviously the failure of the stevedore to sue the shipowner here defeats both purposes—since the employer has given up control or never assumed same and there will be no recoupment; and as for the second purpose listed above, same is rendered useless. Of what use are greater financial and legal resources justifying an assignment if

not acted upon? Where, therefore, the employer has not acted on any statutory assignment at any time and obviously will not, the purposes of the assignment are not satisfied. With respect to any possible purpose to assist the steamship company, such statutory assignment was not designed to aid the steamship company to avoid its liability for its negligence.

Furthermore, *Bandy* was a part of the appeal entitled *Caldwell* v. *Ogden Sea Transport, Inc.*, 4 Cir. 1980 (1a—*et seq.* of plaintiff's petition for writ) and was reversed.

In *Potomac Electric Power Co. (PEPCO)* v. *Wynn, Jr.*, 343 F.2d 295 (D.C. Cir. 1965) the Circuit Court analyzed the amended statute post 1959. There an employee received an award in compensation and thereafter commenced an action against Potomac two weeks before the expiration of the three year statute of limitation. Potomac moved to dismiss the complaint claiming that by statutory assignment the employee was no longer the real party in interest as more than six months elapsed since the award. The Circuit Court denied the motion to dismiss making the following rulings:

> 1) The Longshoremen's and Harbor Workers' Act must be construed liberally in favor of the injured employee.
>
> 2) In 1959 the Act was amended to enlarge the rights of the employee. The amendments provided a financial incentive for the employer to take vigorous action against the third party by allowing the employer to retain one-fifth (1/5) of the proceeds recovered in excess of his expenses and lien. This financial incentive was to encourage the employee to permit assignment of his action in order to enlist the superior resources of the employer in suing the third party.

3) If the employer fails to sue after the statutory assignment, the employee should not be required to produce evidence regarding the employer's motives as such a burden would be inconsistent with the underlying purposes of the 1959 Amendment—to facilitate the employee's recovery against the third party.

4) The statute is not designed to protect third parties from suit but an important purpose is to safeguard the employer's right to recoupment.

5) This purpose of recoupment by the employer does not require the court to penalize the employee if the employer declines to sue the third party. In effect, the employer's declination amounts to a waiver of the protection offered by the statutory assignment.

6) The Act's purposes to benefit the employee, as interpreted by *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 527 (1956) and supplemented by the 1959 Amendments support the view that the employee may bring suit against a third party whenever it is evident that the employer, for whatever reason, does not intend to bring suit.

7) There is no reason in law or equity why an injured employee's rights against a tort feasor should be sacrificed on the altar of the employer's self-interest.

In commenting on the Supreme Court's decision in *Czaplicki, supra,* the Circuit Court in Potomac said that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee. Where there is a conflict and inaction by the assignee, the employee can maintain the third party action himself.

Note that the Senate Committee Report 92-1125 pertaining to the 1972 amendments to the Longshoreman and Harbor Workers' Act at page 3 reports that there was some discussion with respect to continuing said Act as the Workman's Compensation statute covering workmen employed in private industry in the District of Columbia. The Committee Reports state that representatives of such employees stated that these workers desired to continue coverage under said Act. By its action, Congress agreed.

The D.C. Circuit Court has within its district possibly the greatest number of employees affected by this Act. It therefor had more than just a passing interest in the matters discussed in Potomac. That case was decided in 1965 and was in effect and the prevailing law in 1972.

In *Joyner* v. *F&B Enterprises Inc.*, 448 F.2d 1185 (D. of C. Cir. 1971) the Circuit Court cited Potomac stating that it is settled that an injured workman may bring suit against a third party whenever it is evident that the employer assignee for whatever reason doesn't intend to bring suit. When the hearings were held on the question of amending 33 U.S.C. 901, et seq. Sec. 933(b) pertaining to the statutory assignment was not changed and it must have been assumed that the interpretation of that section was as set forth in Potomac.

It was surely not within the contemplation of all parties concerned with the amendments to the Act that a new interpretation would be given to the statutory assignment. The change from Potomac to Bandy and Rodriguez has deprived injured employees of a substantial right. There has been much said and written of the compromises affected by the Amendment to the Act in 1972. There is constant reference to a quid pro quo. Nothing at any time was said of a quid pro quo for the giving up of such substantial right.

The courts had held that an employee may sue shipowner as long as there is no formal order and as long as the employer indicates that he will not sue or act upon the statutory assignment. Everyone assumed that the law was fixed and changes would be statutory in nature—open and known. The employees of the District of Columbia actually requested their Workman's Compensation coverage be continued under the Act. To now find that workmen have lost an established right when no such loss was contemplated or intended at the time of the Amendment, is to destroy the foundation of statutes based on compromise. The District of Columbia workers had a right to assume that under the Act, they would continue to have their rights as set forth in Potomac. If a loss of such rights was involved, they would not have expressed a desire to continue being covered by the Act and at least would have said something about it in opposing such change.

Were it otherwise, one would say that this was retrogressive legislation and that was not the intent of Congress.

It would likewise be unheard of to have employees give up rights of a substantial nature on the passage of a compensation statute without a quid pro quo.

D. Edmonds *v.* Compagnie Generale Transatlantique *holds*

1. In 1972 Congress did not intend any change in the then existing law pertaining to the effect of the statutory assignment under sec. 933(b);

2. The applicable law is a combination of statutory and judicially created law and under the circumstances courts are not free to change judicially created law.

In *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, the Supreme Court pointed out: 1. That because of political considerations and the compromises

affected by the 1972 Amendments, where Congress did not enact a change in the law in any particular respect and did not mention or show an intent to change the law, it must be presumed that Congress did not intend any change in the law. The Court said:

> "The legislative history strongly counsels against the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 amendments contained not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." [18] (266-267)

Footnote 18 referred to includes the statement:

> The debate over § 905(b) involved the removal of the shipowner's liability for unseaworthiness. That occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a *quid pro quo* for increasing the compensation benefits. See S. Rep. 9-10. Some congressmen objected to removing the vessel's liability for unseaworthiness because that would deny millions of dollars of relief for longshoremen's injuries. 118 Cong. Rec. 36382-36384 (1972) (Reps. Eckhardt, Dent, and Ashley). Indeed, the concern shared by some congressmen over any modification of third-party actions "had political ramifications which . . . resulted in forestalling any improvements in the . . . Act for over twelve years." S. Rep. 9. Those congressmen likely would have assailed the diminution of the longshoreman's recovery in proportion to the stevedore's fault if they had any inkling that the amendments did that

The Court also stated at page 271:

> "Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial act . . .' *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. at 278-279."

We have already pointed out that at the time of passage of the 1972 amendment, *Potomac Electric Power Co.* v. *Wynn, Jr., supra,* was the applicable law. Congress did not change that law nor indicated any intention that sec. 933(b) of the Act be interpreted differently than theretofore.

2. Since the applicable law is a combination of statutory and judicially created law, the Supreme Court discussed the question as to whether the courts could or should change the judicially created law as it existed in 1972. The Supreme Court concluded that courts should not do so as they said in *Edmonds* on pages 271-272:

> "we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change.[21] 'One of the most controversial and difficult issues which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations.' S. Rep. 8 By now changing what we have already established that Congress understood to be the law,[22] and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases

advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S., at 112; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S., at 285-286. Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned."

In Footnote 32, the Court included:

"*. . . we can only presume that they acted with the existing state of the law, not the probability of future judicial change, in mind.*"

The circuit court in *Rodriguez* holds in effect that Congress should anticipate that the courts would change the case holdings and if they wanted the law to continue as it existed prior to the 1972 Amendment, then Congress should have so stated affirmatively. The Court suggested that Congress should have set forth in the law that stevedore and longshoremen have concurrent rights to sue the ship. Since Congress did not do so when they had an opportunity so to do, then the Court assumed that Congress did not wish the longshoremen to have such rights.

Such reasoning runs directly contrary to that which the Supreme Court stated in *Edmonds*. There the Supreme Court specifically held that when Congress did not mention or consider any changes in any part of the L.H.W.C.A., by passing the amendments, they had no intention of changing the unmentioned portion of the statute. The Supreme Court also stated that Congress could not anticipate changes made in the law by judicially created law, or what the courts would decide in the future. In *Edmonds*, the

Court advised that courts are not free to change judicially created law.

E. Rodriguez *creates a harsh result contrary to congressional intent.*

Comment should be made of shipowner's position here that plaintiff received sufficient recompense by receiving compensation benefits. They claim that there is no need for plaintiff to sue shipowner because of such payments and the intent of the Statute was to protect the shipowner from such law suits. In effect, shipowner claims that the intent of Congress was to limit the amount received by the injured longshoreman to such benefits. What is unconscionable about this is the fact that in suing a shipowner an injured longshoreman would be entitled to receive not only repayment of his lost wages and medical expense, but also payment for pain and suffering, past and future. Also, under the Workmen's Compensation Act plaintiff is entitled to receive as benefits "maximum" payments based on a formula consisting of a multiple of the national average weekly wage or ⅔ of his average weekly wage—whichever is *lower* (Sen. Rep. p. 4). It appears, therefore, that by not suing the shipowner, plaintiff loses at least ⅓ of his lost earnings plus payment for his pain and suffering. It should be noted that the more sever the injury, the greater the disparity between compensation benefits and that which the shipowner would have to pay as a result of a negligence law suit. Also, the more industrious the longshoreman and the higher his earnings, the more he loses because of the 'maximum'. Yet, shipowner here seems to think that an injured longshoreman is receiving in compensation the equivalent of his losses and, therefore, should be discouraged from suing. The court in *Rodriguez* does not view it as harsh to limit a longshoreman to compensation only.

Congress never intended that shipowner's liability be limited in any manner to the amount of the compensation benefits. Shipowner here claims (and the court deems it not harsh) that the longshoremen should receive compensation benefits only and they should be paid for by the stevedore, thereby leaving the shipowner free from all liability. They attempted to get Congress to include in the Statute that shipowner should be considered employers of longshoremen and so when sued their limit of exposure would have been compensation benefits. Thus, p. 8 of the Sen. Rep. pertaining to the Amendments states:

> "The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act."

Congress having rejected such attempt by shipowner to limit their liability they now claim that Congress intended that their liability should be nil and only stevedore should pay (compensation benefits.)

In *Rodriguez*, the court overlooked the statement in *Edmunds* that

> "Congress clearly contemplated that the employee be free to sue the third party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act". (268)

F. Rodriguez *holding is against public policy since it provides for contribution to Shipowner by Stevedore, at the latter's expense.*

The Circuit Court's opinion and conclusion in *Rodriguez* is contrary to Congressional intent. By the passage of the 1972 Amendments, Congress did not intend the result arrived at by the court. The Senate Committee Report states, at page 11, that a vessel may not by contractual agreement or otherwise require the employer to indemnify it in whole or in part for damages for which it is liable to an injured workman; that vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee's injuries.

The Report goes on to state that the Act prohibits such recovery.

Thus the rule regarding indemnity is a crucial part of the legislative scheme. The Court stated in *Lopez* v. *A/S D/S Svendborg and D/S of 1912*, 581 F.2d 319 (2 Cir. 1978) at 329:

> "To maintain the integrity of that scheme, we should not adopt a rule as to negligence that is so inconsistent with the indemnity prohibition as to undermine a principle which Congress has established as fundamental. As stated in an analogous context in *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972): 'To permit [defendant] to proceed on [an independent contractor] theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result.' There is no warrant for a contention that a right to indemnity arising out of the relationship between an employer and its independent contractor

> is intrinsically immutable. Congress has excised that incident of the relationship 'as a matter of public policy' in cases covered by § 905(b)."

Thus, the economic relationship which results in a contribution from stevedore to shipowner, as here, and penalizes the longshoreman in the process is against public policy and void.

Under Section 905 (b) plaintiff has a right to sue shipowner for its negligence. The Congressional Committee's report pertaining to the 1972 Amendments set forth that imposing such liability will provide the incentive to shipowner to see that its vessel is a safe place to work. The safety on board ship is a prime objective of the Amendments. Yet, contrary to Congressional intent, such ship's liability is eliminated after the six month's provision because of the refusal of stevedore to sue or pursue the action. In *Lopez, supra*, the Court stated at 327:

> "In rejecting the argument of a shipowner that it should not be held liable unless its negligence was the sole cause of the damages, we noted in *Landon*, id. at 763: 'Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees.' The basis for an assumption that prevention can be maximized by shifting the liability to one already liable, and only for a lesser amount is doubtful."

The Congressional Committee reports and statute recognize shipowner's economic power over the stevedores and in legislating that there should be no indemnity or contribution by stevedore to shipowner, made it clear that there should be none directly or indirectly.

Despite the foregoing shipowner is indirectly receiving contribution, contrary to law as a result of stevedore's failure to sue. Despite the foregoing, the economic power wielded by shipowners makes stevedores not sue under the Statutory Assignment.

Here stevedore's refusal to act and failure to seek recoveries against shipowner in all cases is not husbanding its resources for it is giving reimbursement of its compensation payments. In *Lopez*, *supra*, the Court stated at 325-326:

> "In *Pope & Talbot, Inc.* v. *Hawn*, *supra*, the Court held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full, noting, 346 U.S. at 412, that 'reduction of [the shipowner's] liability at the expense of [the stevedore] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case.' We have recently held that *Pope & Talbot* is still good law. *London*, *supra*, 521 F.2d at 760."

In the pertinent opinion of *Dodge* v. *Mitsui*, 528 F.2d 669 (9 Cir. 1975), the Circuit Court stated at 673:

> The problem with the above approach is: call the lien what you may, equitable or legal, the reduction of the stevedore's recovery would be another form of contribution, which the Act seeks to prohibit. The Supreme Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full:
>
> > § 33 of the [Longshoremen's and Harbor Workers' Compensation] Act has specific provisions to permit an employer to recoup his compensation payments

> out of any recovery from a third person negligently causing such injuries. [The shipowner's] contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of [the shipowner's] liability at the expense of [the stevedore employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case. 346 U.S. at 412, 74 S.Ct. at 206.

and stated at 674

> We find no intent indicated by the Act to take away from the employer who pays compensation without an award his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized *wholly apart from* and without regard for the assignment provided for in Sec. 33(b) of the Act. It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. *His right to reimbursement out of the recovery for the employee's injury remains unaffected. The Etna*, 138 F.2d 37, 41 (3rd Cir. 1943) (emphasis added).

The Court in *Dodge* indicates that eliminating the stevedore's recovery would be another form of contribution which the Act seeks to prohibit. Also since the statute specifically provides for an employer recouping his compensation payments, the effect of the economic relationship between stevedore and shipowner "frustrates" the purpose of protecting the employers who are subject to absolute liability by the Act. In the process, plaintiff has

been deprived of his right to recover damages for injuries sustained due to the negligence of the shipowner whether by his suing directly or his collecting his share of the recovery obtained by stevedore in the exercise of the control of the employee's right of action.

Thus, shipowner benefits to the detriment of the plaintiff, an injured workmen, and his employer—stevedore.

Perhaps the most surprising thing of all is that under the foregoing, with the statutory purposes and objectives clearly spelled out, the steamship company still seeks to benefit at the expense of the longshoreman and stevedore by undercutting Congressional intent and statutory purpose and the Second Circuit upholds them in doing so. Shipowner is the one that claims that plaintiff lost his rights to sue defendant and that the stevedore is the only one that can sue—knowing full well that stevedore will never sue—or more correctly, dare not sue. It is stevedore that has the right to intervene in the action and to raise the question of assignment of the cause of action. Shipowner is not the third party beneficiary for such assignment. By Act of Congress they are liable for their negligence without any foreshortened "Statute of Limitations" whether sued by the longshoreman or the stevedore. They seek to choose their adversary. They should not, under these circumstances, have the right to make such choice by raising the question of assignment to defeat a longshoreman's claim.

If they seek to protect themselves from a multiplicity of law suits, they should move to join the employer-assignee in the action under F.R.C.P. 17a.

G. Caldwell *v.* Ogden Sea Transport Inc. *is consistent with Congressional intent, the purposes of the Act and the unrestricted application of the Czaplicki Rule.*

The *Rodriguez* opinion and decision came down on March 19, 1980. Eight days later on March 27, 1980, the Court of Appeals, Fourth Circuit, decided *Caldwell* v. *Ogden Sea Transport, Inc.*, a post 1972 Amendment case (1a-12a). It involved the identical questions of law decided by the Second Circuit in *Rodriguez*. The Fourth Circuit took the diametrically opposite position as to the purpose of the Act, the equitable considerations to be applied, the philosophy of the law involved, and the conclusions reached as to the interpretation and application of the Act and in particular, Section 933(b) thereof. It refused to restrict *Czaplicki* to its peculiar facts.

The Fourth Circuit stated:

> "LHWCA should be interpreted broadly in favor of the injured longshoreman. *E.g., Voris* v. *Eikel*, 346 U.S. 328, 333 (1953). One of its objectives is to place "the burden ultimately on the company whose default caused the injury," *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964), and a negligent shipowner would seem to have no complaint if that burden is placed upon it by the longshoreman rather than the employer or its insurer" (2a).

Where there is a statutory assignment to the employer, the statute does not deal directly with a solution to the problem where the employer fails to bring an action.

> *"While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's sub-*

> *stantive right might be lost simply through inaction of the assignee until the claim is barred from prosecution by anyone.* What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason" (8a-9a). (Italics supplied.)

The Fourth Circuit did not reject or restrict *Czaplicki* as the Second Circuit did but sought to apply its equitable principles. The Court stated:

> "The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue" (11a).

The Court then directed a method of procedure to effectuate its opinion whereby the assignee would be joined as an involuntary plaintiff under F.R.C.P. 19(a). (Under *Rodriguez* such procedure would not be employed.)

Thus the views expressed in *Caldwell* (4 Cir.) are consistent with Congressional intent and purposes of the Act and are in conflict with those expressed in *Rodriguez* (2 Cir.).

At this point it should be noted that in *Northeast Stevedores* v. *Caputo, supra,* this Court stated that the Act must be liberally construed in conformance with its pur-

pose and in a way which avoids harsh and incongruous results. The Second Circuit ignored the purposes of the Act; created a result relieving shipowner of the consequences of its negligence and then stated categorically that limiting the injured employee's time to sue to six months is not harsh,—even if the employer fails to sue thereafter. His substantive rights to recovery from the third party are simply lost by the mistaken belief that such loss is not harsh. Thus, by narrow statutory construction, ignoring the purposes of the Act, the injured employee is deprived of his claim for damages against the third party. The Second Circuit's interpretation of the Act makes it become a statute protecting the steamship company whose fault caused the accident and who by economic means, controls the actions of the stevedore, to the detriment of the injured longshoreman, contrary to Congressional intent.

VII.

CONCLUSION

The decisions of the United States Court of Appeals, Second Circuit, in this matter should be reversed and the judgments entered against petitioners herein should be vacated.

Respectfully submitted,

MORRIS CIZNER
Attorney for Petitioners

MORRIS CIZNER
Of Counsel

No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1980

FREDERICO RODRIGUEZ,

Petitioner,

-against-

COMPASS SHIPPING CO., LTD. and DJAKARTA LLOYD, P.N.,

Respondents.

LUIS PEREZ,

Petitioner,

-against-

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

-against-

OVE SKOU, R.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS COMPASS SHIPPING CO. LTD., DJAKARTA LLOYD, P.N. AND ARYA NATIONAL SHIPPING LINE, LTD.

JOSEPH T. STEARNS
40 Wall Street
New York, New York 10005
(212) 344-4700
Attorney for Respondents

SANDRA R. M. GLUCK
and WALKER & CORSA
Of Counsel

TABLE OF CONTENTS

PAGE

I. Applicable Statutes 1

II. Statement of the Case 2

III. Summary of Argument 11

IV. Argument 13

Introduction 13

POINT I—No Conflict of Interests Sufficient to Avoid the Effect of LHWCA § 33(b) Can Exist 19

POINT II—Petitioners Did Not Regain the Right to Bring Suit in Their Own Names By Reason of the Statutory Assignees' Failure to Bring Suit 24

POINT III—Considerations of Policy Should Lead the Court to Construe § 5(b) According to Its Unambiguous Terms 30

A. A Comparison of Benefits Available Under the Act and Recoverable Damages 30

B. The Role of The Longshoreman's Third Party Case in Promotion of Safety 38

V. Conclusion 44

APPENDIX .....

TABLE OF AUTHORITIES

PAGE

Adkins v. *Safeway Stores, Inc.*, 6 BRBS 513, B.R.B. No. 76-317 (Aug. 23, 1977) 34

Albanese v. *N.V. Nederl. Amerik Stoomv. Maats.*, 346 F.2d 283 (2d Cir. 1965), rev'd on other grounds 382 U.S. 283 (1965) 39

Amato v. *Pittston Stevedoring Corp.*, 6 BRBS 537, B.R.B. No. 76-348 (Aug. 29, 1978) 33

American Export Lines, Inc. v. *Alvez*, —— U.S. ——, —— S.Ct. ——, 64 L.Ed.2d 284 (1980) 32

American Mutual Insurance Co. of Boston v. *Jones*, 426 F.2d 1263 (D.C. Cir. 1970) 32

American Stevedores Inc. v. *Porello*, 330 U.S. 446 (1947) 13, 43

Bachich v. *Seatrain Terminals of Cailfornia*, 9 BRBS 184, B.R.B. No. 78-289 (Nov. 2, 1978) 33

Ballard v. *Newport News Shipbuiding & Dry Dock Co.*, 8 BRBS 676, B.R.B. No. 77-875 (Aug. 15, 1978) 33, 35

Bath Iron Works Corp. v. *White*, 584 F.2d 569 (1st Cir. 1978) 33

Bell v. *Calumet Harbor Terminals, Inc.*, 6 BRBS 307, B.R.B. No. 76-494 (July 18, 1977) 32

Bernardini v. *Rederi A/B Saturnus*, 512 F.2d 660 (2d Cir. 1975) 39

Bloomer v. *Liberty Mutual Insurance Co.*, 445 U.S. 74, 63 L.Ed. 2d 215 (1980) 35, 36, 37, 43, 44

Caldwell v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), affirming in part, vacating and remanding in part *Bandy* v. *Bank Line, Ltd.*, 442 F. Supp. 882 (E.D.Va. 1977) 11, 16, 17, 25, 26, 27, 37

Canizzo v. *Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978) 29

Conteh v. *Greyhound Lines, Inc.*, 8 BRBS 874, B.R.B. No. 78-365 (Sept. 29, 1978) 33

Cooper Stevedoring Company, Inc. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 41

PAGE

Cunnyngham v. *Donovan*, 271 F. Supp. 508 (E.D.La. 1967), aff'd *sub. nom. Fluor Corporation* v. *Cunnyngham*, 403 F. 2d 223 (5th Cir. 1968), *cert. den.* 394 U.S. 943 (1969) 32

Czaplicki v. *The Vessel "S.S. HOEGH SILVERCLOUD"*, 351 U.S. 525 (1956) 6, 10, 12, 13, 14, 15, 19, 20, 21, 22, 24, 25, 26, 42

Director, Workmen's Compensation Programs v. *Rasmussen*, 440 U.S. 29 (1979) 28, 32

Dobbins v. *Crain Bros., Inc.*, 567 F.2d 559 (3rd Cir. 1977) 43

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 22, 23, 25

Fairmont Shipping Corp. v. *Chevron International Oil Co., Inc.*, 511 F.2d 1252 (2d Cir. 1975) 41

Federal Marine Terminals, Inc. v. *Burnside Shipping Co., Ltd.*, 394 U.S. 404 (1969) 42, 43

Fontana v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D.N.Y. 1952), aff'd *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir. 1953) 42

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) 21

Hernandez v. *Costa Armatori, S.p.A.*, 467 F. Supp. 1064 (E.D.N.Y. 1979) 22

Independent Stevedore Company v. *O'Leary*, 357 F.2d 812 (9th Cir. 1966) 34

Italia Societa Per Azioni Di Navigazione v. *Oregon Stevedoring Company, Inc.*, 376 U.S. 315 (1964) ... 39, 40

Jackson v. *Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967) 22

Johnson v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) 21

Joyner v. *F & B Enterprises, Inc.*, 448 F.2d 1185 (D.C. Cir. 1971) 42

PAGE

Landon v. *Leif Hoegh and Co. Inc.*, 521 F.2d 736 (2d Cir. 1975) *cert. den.* 423 U.S. 1053 (1976) 43

Larios v. *Victory Carriers, Inc.*, 316 F.2d 63 (2d Cir. 1963) 5

Marullo v. *Rhederei Richard Schroeder, K.G.*, No. 79 Civ. 3757 (S.D.N.Y. 1980) 17

McIntosh v. *Parkhill-Goodloe Co.*, 4 BRBS 3, B.R.B. No. 75-263 (May 17, 1976), aff'd mem. 550 F.2d 1283 (5th Cir. 1977), *cert. den.* 98 S.Ct. 766 (1978) 35

McNamara v. *Weichsel Dampfschiffahrts AG Kiel, Germany*, 339 F.2d 475 (2d Cir. 1964) 40

Motta v. *Resource Shipping & Enterprises, Inc.*, No. 76 Civ. 5217 (S.D.N.Y. 1980) 17

Nacirema Operating Company v. *Oosting*, 456 F.2d 956 (4th Cir. 1972) *cert. den.* 409 U.S. 980 (1972).... 32

Napoli v. [*Transpacific Carriers, Etc.*] *Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976) 41

Norfolk & Western Pacific Railway Co. v. *Liepelt*, —— U.S. ——, 100 S.Ct. ——, 62 L.Ed.2d 689 (1980) 37

O'Leary v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951) 34

Perez v. *Arya Shipping Line, Ltd.*, 468 F. Supp. 799 (S.D.N.Y. 1979) 7, 8, 9

Perini Corp. v. *Heyde*, 306 F. Supp. 1321 (D. R. I. 1969) 33

Pope & Talbot v. *Hawn*, 346 U.S. 406 (1953) 21, 42

Potomac Electric Power Company v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) 20, 24, 25, 26

Rasinski v. *I.T.O. Corp. of Baltimore*, 7 BRBS 1012, B.R.B. No. 77-277 (Feb. 28, 1978) 34

Reed v. *Steamship Yaka*, 373 U.S. 410 (1963) 22

Rodriguez v. *Compass Shipping Co., Ltd.*, 456 F. Supp. 1014 (S.D.N.Y.), affirmed 617 F.2d 955 (2d Cir. 1980) 4, 6, 8, 9, 10, 11, 16, 17, 18, 22

Ruiz v. *Universal Maritime Service Corp.*, 8 BRBS 451, B.R.B. No. 78-135 (May 30, 1978) 35

PAGE

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 10, 13, 14, 19, 20, 21, 22, 23, 24, 25, 38, 39, 40, 41

Spano v. *Koninklijke Rotterdamsche Lloyd*, 472 F.2d 33 (2d Cir. 1973) 40

Tangorra v. *Nat'l Steel & Shipping Co.*, 6 BRBS 427, B.R.B. No. 76-328 (Aug. 18, 1977) 33

The Etna, 138 F.2d 37 (3rd Cir. 1943) 35, 42

The Owen, 43 F. Supp. 897 (E.D. Pa. 1942) 20, 24

Travelers Insurance Company v. *Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. den.* 350 U.S. 913 (1955) 33

United States v. *Standard Brewery*, 251 U.S. 210 (1920) 28

Valentino v. *Rickners Rhederei, G.M.b.H.*, 552 F.2d 466 (2d Cir. 1977) 35, 36, 37

Vendemia v. *Cristaldi*, 221 F.2d 103 (D.C. Cir. 1955).... 34

Weyerhaeuser Steamship Co. v. *Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958) 40

Wheatley v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968) 34

Zapico v. *Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978) 42

Statutes

Longshoremen's and Harbor Workers' Compensation Act:

33 U.S.C. §901 *et seq.* (1972) 2

33 U.S.C. §902 24

33 U.S.C. §905 ..... 1, 10, 11, 14, 15, 16, 18, 19, 22, 23, 25, 26, 27, 28, 29, 30, 40, 43, 44

33 U.S.C. §906 ..... 30, 32, 33

33 U.S.C. §908 ..... 3, 4, 30, 31, 32, 33, 34, 37

33 U.S.C. §909 ..... 31, 32

33 U.S.C. §914 ..... 3, 13

33 U.S.C. §920 34

33 U.S.C. §933 ..... 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 37, 43

33 U.S.C. §941 ..... 38, 39, 41

PAGE

28 U.S.C. §1254(1) (1948) 10
29 U.S.C. §651 *et seq.* 38
73 Stat. 391 (1959) 10, 13
86 Stat. 1263 (1972) 2
D.C. CODE ANN. §36-501 20
N.Y. CIV. PRAC. LAW §214(5) (McKinney) 5

Rules

Federal Rules of Civil Procedure
Rule 12 ..... 5, 6, 7
Rule 17 ..... 9, 12, 15, 16, 17, 26, 28
Rule 19 ..... 16, 28
Rule 56 ..... 7, 8

Regulations

20 C.F.R. 702.311 (1973) 3
29 C.F.R. 1918 *et seq.* (1970) 38

Congressional Reports

H.R. REP. NO. 92-1441, 92nd Cong., 2d Sess. 1, Reprinted in [1972] *U.S. Code Cong. & Ad. News* 4698 ..... 14, 28, 37, 38, 39, 41

S. REP. NO. 92-1125, 92nd Cong., 2nd Sess. 1 (1972) . 14, 23

Hearing on H.R. 247 *et al.* before the Select Subcommittee on Labor and Public Welfare, 92nd Cong., 2d Sess. 44

Other Authorities

RESTATEMENT (SECOND) OF TORTS (1966):
§343 41
§343A 41

Code of Professional Responsibility
E.C. 3-8 36
E.C. 7-23 43

No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1980

FREDERICO RODRIGUEZ,

Petitioner,

-against-

COMPASS SHIPPING CO., LTD. and DJAKARTA LLOYD, P.N.,

Respondents.

LUIS PEREZ,

Petitioner,

-against-

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

-against-

OVE SKOU, R.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS COMPASS SHIPPING CO. LTD., DJAKARTA LLOYD P.N. AND ARYA NATIONAL SHIPPING LINE, LTD.

I.

Applicable Statutes

In addition to those statutory provisions set out in the Brief of Petitioners (pp. 2-3) the following statute is applicable:

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

II.

Statement of the Case

This appeal involves suits for negligence against shipowners by longshoremen claiming personal injuries sustained aboard ships in the port of New York. In each case plaintiff claimed workmen's compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "the Act" or "LHWCA"), Title 33 U.S.C. § 901 *et seq.* (as amended October 27, 1972), Pub. L. No. 92-576, 86 Stat. 1263 (1972). In each, plaintiff was paid so-called "voluntary" compensation "without an

award" as required by § 14(a) (33 U.S.C. § 914(a)) on account of alleged temporary total disability as provided by the Act's § 8(a) (33 U.S.C. § 908(a)). Frederico Rodriguez ultimately received $1,040.70 in such benefits from his employer, International Terminal Operating Co., Inc. for a disability period of 6⅞ weeks. Benefits were calculated at the rate of $159.06 per week, 66⅔% of his average weekly wage at the time of injury which was agreed to have been $238.59 (41a).[1]

Luis Perez ultimately received $1,200.10 in temporary total disability benefits from his employer's insurer, Midland Insurance Company. His benefits were calculated at the rate of $152.74 based on an average weekly wage of $229.12 and were paid for a 7⅞ week period.

Both Rodriguez and Perez sought additional compensation under § 8(c) for permanent partial disability. In the case of Rodriguez, this led to an informal conference before a claims examiner at the United States Department of Labor, Office of Workers' Compensation Programs ("OWCP"). This conference, authorized by 20 C.F.R. § 702.311 (1973), took place November 4, 1974 and resulted in agreement among Rodriguez, his compensation representative and a representative of his employer to disposition of the claim for permanent partial disability, which was settled by the employer's agreement to pay the sum of $2,519.51 representing an award of 5½% permanent partial disability of the left leg.[2] The details of this agree-

1. Page references followed by the letter "a" are to be found in the Joint Appendix.

2. The sum of $2,519.51 was calculated on the basis of § 8(c)(2) as 5½% of that compensation payable in the event of loss of the leg or 280 weeks, § 908(c)(2). The money equivalent of "weeks" in computing awards for permanent injury is the same basis as for temporary total disability—66⅔% of the employee's average weekly wage.

Mr. Rodriguez also received $613.52 in additional temporary total disability benefits (41a) for that part of the alleged disability period in the aftermath of his injury which had been disputed by his employer.

ment were set out in a memorandum of informal conference (41-42a) the preface of which recited that: "[w]e the undersigned, having attended an informal conference, and having received a copy of the [within] signed agreement, in this case on 11/4/74 (sic), agree, by the issuance of a compensation order . . ." Despite reference to a compensation order none was issued, a fact of no significance to this appeal.[3]

Mr. Perez's claim for additional compensation was determined by the OWCP without hearing and resulted on March 24, 1975 in the issuance by the district deputy commissioner of a formal order granting this petitioner additional compensation of $4,360.73 representing "awards" of 5% and 7½% for loss of use of, respectively, the left foot and left hand.[4]

Mr. Rodriguez's original suit against a "third person" said to be "liable for damages" (§ 33(b)) was begun by filing of the complaint in the United States District Court,

---

3. Petitioners posed four questions in the petition for writ of certiorari. The fourth question raised issue of the sufficiency of the claims examiner's participation in the settlement, and whether the memorandum was an "award of compensation in an order filed by the deputy commissioner or [Benefits Review] Board" § 33(b). Petitioners were, however, granted a writ limited to the first three questions presented which do *not* raise issue of any "technical administrative lapse" by the OWCP (see *Rodriguez* v. *Compass Shipping Co., Ltd.*, 456 F. Supp. 1014, 1020 (S.D.N.Y. 1978)) or any other defect in the compensation procedure. In *Rodriguez* both the district court and court of appeals held that the proceeding before the board constituted an "award" of sufficient formality to cause triggering of the § 33(b) assignment provision six months thereafter in view of Mr. Rodriguez's failure to sue a "third person" said to be "liable in damages" (§ 33 (a) and (b)) within six months of "acceptance" of "such compensation," § 33(b). Petitioner, Rodriguez ". . . [did] not dispute" that he had accepted the additional compensation awarded him on November 4, 1974 ". . . or that he instituted suit against the defendants more than six months after . . . his receipt of such [additional] compensation." *Rodriguez,* 456 F. Supp. at 1019.

4. Under § 8(c)(3) loss of the hand results in 244 weeks compensation for permanent partial disability. The foot results in 205 weeks, § 8(c)(4).

Southern District of New York on June 2, 1976,[5] 33 months from the occurrence of his September 4, 1973 injury. Mr. Perez began his suit on July 16, 1976, 35 months after his injury of August 30, 1973.[6]

In answer to the complaint of Rodriguez and Perez the several respondents raised as an affirmative defense, among others, the § 933(b) assignment of "all right" of petitioners to their former employers or insurance carriers asserting that petitioners were ". . . therefore without standing to maintain . . . [their] action[s]" (answer of Compass Shipping Co., Ltd. and Djakarta Lloyd P.N., paragraph 10 (26a); answer of Arya National Shipping Line, Ltd., paragraph 9. See, document 4, index to record on appeal, USDC, SDNY Index No. 76-3009.)

On April 21, 1978 respondents Compass and Djakarta Lloyd moved for summary judgment on the issue of liability for negligence and, in the alternative, to dismiss the Rodriguez complaint on grounds of the § 33(b) assignment and Rule 12(c) Fed.R.Civ.P. (judgment on the pleadings).[7] This motion was denied with respect to the application for summary judgment, which was asserted on the basis of petitioner Rodriguez's utter inability during the taking of his

5. This suit named Compass, the shipowner as a defendant. At the time of the injury in suit, the vessel aboard which Mr. Rodriguez claimed injury, S/S SOUTH BREEZE, was under bareboat charter to respondent Djakarta Lloyd, P.N. which employed the ship's crew. This action, in which Djakarta Lloyd was joined, was begun July 21, 1977.

6. Under the law of the State of New York, N.Y. CIV. PRAC. LAW § 214(5) (McKinney), suits for personal injuries must be begun within three years, which is the "rule-of-thumb" in determination of laches. *Larios* v. *Victory Carriers, Inc.*, 316 F.2d 63 (2d Cir. 1963).

7. In the affidavit of Joseph T. Stearns (April 21, 1978) in support of the motion based on the § 33(b) assignment, the relief sought was characterized as ". . . for a dismissal of this (sic) complaint on grounds that plaintiff's cause of action was assigned by operation of law prior to institution of suit . . . (32a)".

pre-trial deposition to account for the occurrence of his shipboard injury in terms other than his own carelessness.[8]

The motion to dismiss on grounds of Rule 12(c) Fed. R.Civ.P. and the § 933(b) assignment, which the district court described as brought "... on ground that ... plaintiff's claim for relief ... was assigned to his employer," (*Rodriguez,* 456 F. Supp. at 1017) and upon contention "... that under the terms of ... [§ 33(b)] ... plaintiff no longer has any claim of relief" (*Id.* at p. 1018) was also denied; not because the district court (Robert L. Carter, J.) had held that no assignment had occurred, or because the defendants/respondents were without standing to assert it, but because of the *potential* existence of a conflict of interest between this petitioner and his employer sufficient to require that the district court not give effect to the statutory assignment. This holding was, of course, obedient to this Court's decision in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD",* 351 U.S. 525 (1956). Because of this conflict of interest "exception" (*Rodriguez,* 456 F. Supp. at 1022) the parties were given 60 days from the court's decision of September 12, 1978 to undertake discovery on the issue, with plaintiff to bear the burden of persuasion.

---

8. Mr. Rodriguez was allegedly hurt while climbing out of No. 2 hatch of M/S SOUTH BREEZE at the end of the day's work discharging bags of coffee. Hatches Nos. 2 and 3 shared a common bulkhead and the ladder to hatch No. 2 was on the other side of the ladder leading down in No. 3. Rodriguez claimed that he stepped out of the No. 2 hatch ladder manhole partly into the opening to the ladder into No. 3. Why this had happened he could not say. Thus, at p. 28 of the transcript of his deposition (Ex. "A" to the affidavit of Joseph T. Stearns sworn to April 21, 1978 in support of the motion) the following question and answer appears:

> Q. You can do nothing but repeat your description of this alleged accident, you cannot account, in any way, shape or form for why it happened that you put your left foot into the opening for hatch no. 3? A. What reason can I give you?

Mr. Rodriguez did not avail himself of discovery. Instead his attorney, on November 27, 1978, more than 60 days later, submitted a hearsay affidavit attributing to one Albert P. Cerrachio, an officer of plaintiff's employer, International Terminal Operating Co., Inc. "oral advice," ". . . that as a matter of company policy ITO did not in the past bring, maintain and/or assume the prosecution of an action against a shipowner and will not in the future bring, maintain and/or assume the prosecution of any action against a shipowner[9]" (63a).

On December 8, 1978, the district court, Mr. Rodriguez in its view having failed to discharge his burden of demonstrating a conflict of interest between himself and his employer, International Terminal Operating Co., Inc., entered a final order of dismissal ". . . pursuant to Title 33 U.S.C.A. § 933(b)" (74a) from which petitioner appealed.

In suit brought by Luis Perez, respondent moved on November 16, 1978 "for an order [of dismissal] pursuant to Rules 12 and 56 Fed.R.Civ.P. and Title 33 U.S.C.A. ¶ 933(b)." This motion, which the district court characterized as one "to dismiss the complaint on the grounds that since Perez did not commence . . . [his] . . . action within six months of the Board's (sic) award, his cause of action was assigned to his employer, and he cannot maintain this suit", *Perez* v. *Arya Shipping Line Ltd.*, 468 F. Supp. 799, 800 (SDNY 1979), was conditionally denied on April 17, 1979 by opinion and order of the district court (Morris E. Lasker, J.) in which the court, adopting the

9. This submission is classically inappropriate in light of the requirements of Rule 56(e) Fed.R.Civ.P. requiring that affidavits in opposition to a motion for summary judgment "be made on personal knowledge" setting forth facts "as would be admissible in evidence." Reciting the operative part of the attorneys' affidavit should not be considered as an abandonment by respondents, Compass and Djakarta Lloyd of their claim that petitioner Rodriguez established *nothing* of a probative nature to explain this stevedore's "failure" to sue on the § 33(b) assignment.

procedure required by Judge Carter's *Rodriguez* opinion, allowed Perez 45 days within which to submit proof of a sufficient interest conflict. No such proof was offered, although in opposition to the motion Perez's attorney, Martin Lassoff, Esq., had submitted an affidavit sworn to November 27, 1978 quoting one John Richardson, a claims attorney for Midland Insurance Company in which the attorney represented that he had been told:

> ". . . that Midland Insurance Company has not and will not make any claim, bring an action or maintain any action against the shipowner to recover damages for its negligence when a longshoreman is injured and the Company or its client stevedore could bring such action because to do so would prejudice their clients who fear that it would adversely affect their economic relationship with the steamship company." (129a)[10]

By notice of motion dated July 2, 1979, respondent Arya National Shipping Line, Ltd. moved ". . . for an order pursuant to Rule 56 Fed.R.Civ.P. for summary judgment dismissing plaintiff's complaint on grounds that pursuant to . . . 33 U.S.C. § 933(b) 'all right' of plaintiff . . . [had] . . . been assigned to his former employer's workmen's compensation insurance underwriter . . ." (Record on Appeal, SDNY Index No. 76-3009, document No. 18). On August 10, 1979, by endorsed order, Judge Lasker, after noting petitioner Perez's default in failing to undertake discovery, granted respondent Arya National Shipping Line, Ltd. summary judgment dismissing petitioner's complaint, from which he appealed.

Mr. Perez's appeal to the Second Circuit Court of Appeals was heard simultaneously with the appeal from

---

10. We cite for convenience to the identical language in Mr. Lassoff's affidavit in opposition to the motion by shipowner to dismiss in *Barulec* v. *Ove Skou, R.A.* The Lassoff affidavit in *Perez* is Record on Appeal document No. 13 in SDNY Index No. 76-3009.

the dismissal in *Rodriguez* and on March 19, 1980 the judgment of dismissal of his case was "affirmed for the reasons stated in . . . [the Court of Appeals] . . . opinion in the case of *Rodriguez* v. *Compass Shipping Co., Ltd. and Djakarta Lloyd, P.N.*, Docket No. 79-7132 . . ." The "reasons stated" by the Court of Appeals in *Rodriguez* are the following:

1. A "third person" defendant has "standing" to raise the § 933(b) assignment defense which the court held may "always" be invoked pursuant to Fed.R.Civ.P. 17(a)[11] since otherwise a defendant might be exposed to multiple suits based on the same claim. *Rodriguez* v. *Compass Shipping Co. Ltd.*, 617 F.2d 955, 958 (2d Cir. 1980)

2. The Rule 17(a) Fed.R.Civ.P. defense was properly asserted, assuming the assignment to be "valid," on the particular facts of the case, because the right to sue was exclusively that of the employer which had "not joined in the action or ratified its commencement even though it has had a reasonable time to do so" (*id.*).

3. The settlement agreement "was an award in a compensation order" with the meaning of § 33(b) triggering the assignment provision and the failure of the deputy commissioner and the claims examiner to thereafter file a formal

11. The Court of Appeals, to a degree difficult to assess in scrutinizing its opinion, based its decision on Rule 17(a) Fed.R.Civ.P. "real party in interest" considerations not specifically urged as a basis for dismissal or affirmance. The *Rodriguez* defendants instead urged that they "as . . . 'third parties' under the Act have standing to assert § 933(b) as a complete defense." (Brief of Defendants-Appellees, pp. 26-30). In *Perez* respondent urged that it ". . . [had] standing to assert § 933(b) as a complete defense." (Brief on Appeal pp. 21-28). It is, therefore, accurate to say that respondents did not seek dismissal under Rule 17(a) Fed.R.Civ.P. but on a broader ground i.e. the Act's § 33(b) by urging that ". . . § 933(b) acts as a filter to ensure . . . that injured employees will not as an afterthought defeat the purpose of the 1972 Amendments by bringing actions based on unseaworthiness which are disguised as 'negligence' claims" (*Rodriguez* Brief of Defendants-Appellees pp. 36-37).

order "can have no significance as far as the parties [to the law suit] are concerned" (at 959).

4. On the facts of the case and relevant federal regulations in effect at the time of the November 4, 1974 informal conference, § 33(b) applied and operated to assign to appellant's employer his right to sue the shipowner (at pp. 959-960).

5. In light of the applicability of § 33(b) and its effect of causing an assignment, petitioner's suit was not saved by the so-called "exception" to giving effect to the § 33(b) assignment established in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD," supra,* in light of the amendments to §§ 33(a) and (b) in 1959, 73 Stat. 391 (1959) and the 1972 Amendments to the LHWCA, principally § 5(b), insulating the employer from liability for "such damages" of an employee entitled to compensation under the Act. In this connection, and with respect to this the overriding issue presented in this appeal—whether the effect of the assignment on petitioner's rights should be avoided as a matter of fairness or public policy—the Second Circuit Court of Appeals held that the petitioner had been "afforded six months to bring his own suit" and that the "six month time bar" was not "unreasonable or harsh under the circumstances" (p. 960). Thus, the Court of Appeals treated the *Czaplicki* "exception" as limited to the "situation" presented in that case, where § 33(b) of the LHWCA, prior to 1959 and by reason of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), meant that the § 33(b) assignment, if asserted by the stevedore, would result in a "defense" by the shipowner that the employer was liable for indemnity for all of the longshoreman's damages (at 960).

On June 16, 1980 petitioners Rodriguez and Perez applied for writ of certiorari. This application was granted October 6, 1980, presumably under 28 U.S.C. § 1254(1) (1948) on grounds of a conflict between the Second Circuit's

Rodriguez holding and the decision of the Fourth Circuit Court of Appeals in *Caldwell* v. *Ogden Sea Transport, Inc.*, (and related cases), 618 F.2d 1037 (March 27, 1980).

The questions accepted by this Court for review concede the fact of assignment and propose that the petitioners' right to sue the shipowners be "deemed reassigned" on account of the "failure or refusal"[12] of the employer or its insurer to sue,[13] resulting from the presumed existence of a "conflict of interest" between petitioners and their employers. Petitioners urge such result as a matter of compulsion on alleged "equitable" considerations, or in order to serve the "purposes of the Statute", which petitioners say is "for the employer to recoup its loss occasioned by the payment of compensation and for the injured employee to have the right to sue a negligent third party for damages" (Petitioners' Brief, p. (i), Question 3).

III.

Summary of Argument

Respondents respectfully sumbit that a suit brought pursuant to § 5(b) of the LHWCA must be "in accordance with the provisions of section 933 of this title" and, therefore, can only be instituted in the name of the injured longshoreman within six months of his acceptance of compensation under an award, § 33(b). Failure to commence an action within such time divests the longshoreman *absolutely* of "all right . . . to recover damages" against the vessel. Thereafter, suit may only be maintained in the name of the statutory assignee, to whom "all right" of the longshoreman has been assigned under § 33(b) of the Act.

---

12. If the petitioners' attorneys' affidavits are incompetent to prove the assignee's motive for not bringing suit, *and they are*, the issue is not the significance of a "refusal" but a *"failure"* to sue.

13. Subrogated to the interests of the employer by virtue of § 33(h).

Accordingly, where a § 33(b) assignment has occurred and suit is brought in the name of the longshoreman, "the vessel" may assert as a *substantive* defense that the named plaintiff is without standing to maintain the action. That such defense is substantive in nature and, therefore, not limited to and controlled by Rule 17(a) Fed.R.Civ.P., is a conclusion mandated by well-established principles of statutory interpretation which require the courts to construe statutes according to their plain meaning. It is further compelled by recognition that, by virtue of the 1972 Amendments to the Act, there is no longer basis for a "judicial solution" which either denies effect to the assignment on ground of conflict of interests or which seeks to reverse the assignment by permitting reassignment or ratification by the statutory assignee. With respect to conflict of interests, the 1972 Amendments removed the source of the conflict which had earlier provided impetus for the so-called "conflict of interest exception" in this Court's decision in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD"*, 351 U.S. 525 (1956) and made clear Congress' intention that whatever conflict remained could be tolerated in light of the 1959 Amendments providing the longshoreman with six months to bring suit free and clear of any control by his employer. Finally, Congress' objectives in enacting the 1972 Amendments and the effect of those Amendments on the role of the third party suit militate against affording to longshoremen a completely unrestricted right of suit and support a decision by this Court interpreting the six month provision in § 33(b) as a "time bar" with respect to suits brought in the name of the longshoreman.

IV.

Argument

Introduction

The statutory provision at issue on this appeal, § 33(b) of the LHWCA, was last before this Court in *Czaplicki* v. *The Vessel "SS HOEGH SILVERCLOUD"*, 351 U.S. 525 (1956). In that decision, the Court denied effect to the assignment provision of § 33(b), a result which was, at that time, absolutely required to ensure the continued viability of the longshoreman's third party action when compensation benefits were entirely inadequate. As § 33(b) then read, assignment to his employer of "all right" of the longshoreman to institute such third party suit occurred as soon as he accepted compensation under an award; and, by virtue of the Court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp., supra,* granting a right of indemnity to the shipowner against the longshoreman's employer for damages recovered in the third party suit, the stevedore employer's interests were clearly best served if no third party action were brought. As Justice Black noted in his dissent in *Ryan,* 350 U.S. at 144-45 "employers [would] not be eager to finance suits against themselves" (*Id.* at 145). Avoidance of suit, of course, could easily be accomplished by the employer "forcing an award"[14] and gaining control of the employee's third party right as a result of the assignment provision, by merely refusing to pay compensation on a voluntary basis as required by § 14 of the Act. This right could then be "compromised" pursuant to § 33(e) to the disadvantage of the employee.

The case now before the Court arrives in a radically different posture. By amendments enacted in 1959 (73

14. See *American Stevedores Inc.* v. *Porello,* 330 U.S. 446, 455 (1947).

Stat. 391) and 1972, Congress not only rectified the specific problems of § 33(b) addressed in *Czaplicki,* but also fundamentally altered the role of the third party suit by making it the secondary source of "compensation." No longer, as a result of the § 5(b) insulation of the employer from claim for an employee's damages by shipowners, is a longshoreman's suit threatened by any conflict between his interests and those of his employer. Since 1972 and the repeal of the *Ryan* indemnity action, the employer has no motive to interfere with and gain control over its employee's suit. Nor, since 1959, has the employer had the power to do so because § 33(b), as amended, affords longshoremen six months following acceptance of an award of compensation in which to bring suit, free and clear of any control by their employers.

While Congress took clear steps to ensure the *viability* of the third-party suit, it enacted equally clear measures in 1972 designed to *discourage* their volume. By vastly increasing the compensation benefits payable to employees by their employers, Congress diminished the value of the third party suit to longshoremen while intending to increase the incentive for stevedore employers to promote safer working conditions by proposing to "assur[e] that the employer bears the cost of unsafe conditions". S. REP. NO. 92-1125, 92nd Cong., 2nd Sess. 1 (1972). See also H.R. REP. NO. 92-1441, 92nd Cong., 2nd Sess. 1 reprinted in [1972] *U.S. Code Cong. & Ad. News* 4698, 4701-03. And, of course, Congress limited the liability of shipowners in suits by longshoremen by eliminating the unseaworthiness remedy.

The cumulative effect of Congressional activity since 1956 has thus been two-fold: (1) the courts need no longer be concerned with "saving" the third-party suit, the survival of which has been assured by the removal of the *Ryan* "conflict of interest" and by the six month provision in § 33(b); (2) the courts are no longer required to, and,

indeed, should not, give the traditional freest reign to longshoremen's personal injury actions for fear that compensation benefits will be inadequate. Petitioners' argument resolutely ignores these developments and urges that the Court apply *and greatly extend* its decision in *Czaplicki.* They argue not for the right of a longshoreman to bring suit, but for that right to be completely unrestricted—notwithstanding Congress' clear directive contained in the unambiguous language of § 5(b), that the right of the longshoreman to bring suit in his own name be limited to instances where there has been compliance with the six month provision of § 33(b).

On the record of this proceeding, there are, strictly speaking, only two issues. The first is whether the assignment provision of § 33(b) affords a defense *at all* to shipowners where the stevedore employer, or its subrogated insurer, has failed to bring suit for whatever reason on its assigned cause of action. In short, petitioners first urge that there is no "assignment" defense and hence, no basis for objection by respondents, or the statutory assignees, to suits proceeding in petitioners' names because: (a) failure to sue, for whatever reason, constitutes a waiver by the stevedore of its right of suit, which operates in favor of the employee who thereby regains the right to sue in his own name; or (b) that there is a presumed conflict between the interests of the stevedore and its employee which, as a matter of law, requires that the statutory assignment provision of § 33(b) not be given effect.

The second issue raised by petitioners presents an alternative argument—*viz.,* assuming the assignment defense does exist, that it provides to shipowners only a purely procedural defense, one limited in its reach to, and controlled by, Rule 17(a) Fed.R.Civ.P.—a defense which, according to petitioners, can and should be overcome by adoption of the procedural techniques sponsored by the Fourth Circuit

Court of Appeals in *Caldwell* v. *Ogden Sea Transport Inc., supra.* By arguing the correctness of the *Caldwell* result, petitioners seek, at least, a reversal in order to have the opportunity to properly establish as a matter of record in these cases whether the statutory assignee will sue, which petitioners would have determined by means of a Rule 19(a) Fed.R.Civ.P. joinder, as suggested by the *Caldwell* court (618 F. 2d at 1046), or by soliciting and receiving by some other means a "formal signal" (*Id.*) of intention from the assignee.

This Court may well determine, as did the Second Circuit Court of Appeals, that time has long passed for petitioners to avail themselves of such procedural steps, since they did nothing of an effective or competent nature to secure respondents against the threat of multiple claims as a result of the injuries in suit, despite having had ample opportunity to do so (*Rodriguez,* 617 F.2d at 958). While the record of these cases provides basis for a result of this kind, such a determination will achieve a result far too narrow to have any impact beyond those cases which are subject to this proceeding. In respondents' respectful submission, the Court *must* also consider whether the existence of a valid § 33(b) assignment defense is *procedural* only or, whether, as respondents' contend, that by virtue of §5(b) of the Act, suits by longshoremen against shipowners subject to the Act's assignment provision are to be deemed "time barred" (*Rodriguez,* 617 F.2d at 960) on *substantive* grounds so as to prevent longshoremen (but not their employers or their compensation insurers) from instituting suit after the six month period, notwithstanding any attempted "reassignment" or "ratification" by the stevedore employer. It is obvious that any § 33(b) assignment defense bottomed on Rule 17(a) Fed.R.Civ.P. is voidable by recourse to any one of the procedures which that rule provides, in order to prevent dismissal of action in the name of the original plaintiff,

who at the time suit is begun is not the "real party in interest." It is respondents' contention that since there is, in fact, *no* "conflict of interest" today between a §33(b) assignee and an employee, any assignment defense so limited will be entirely ineffective.[15]

It is respectfully submitted that the *real* conflict between the *Rodriguez* and *Caldwell* decisions is to be found in their differing perception as to whether the nature of the assignment defense is substantive or procedural, since both decisions concede the *existence* of the defense. The importance of resolution of this issue by the Court is underscored by the fact that, in the aftermath of the *Caldwell* decision, and relying on the ambiguous language of the Second Circuit Court of Appeals in *Rodriguez,* two District Courts in the Southern District of New York have permitted suits instituted by longshoremen after the six month period prescribed by § 33(b) to be "restored" to their original postures through the devices of reassignment or ratification under Rule 17(a).[16]

---

15. There is no interests conflict in what is perhaps the typical case where the assignee is the stevedore's insurer. The latter has, of course, no motive *not* to "ratify" or "reassign" a suit subject to § 33(b) arising from any fear of antagonizing not its own but the stevedore's customers. See *Rodriguez,* 617 F.2d at 960. Both the stevedore and its insurer have interest in recovering the incurred compensation liability through the third party suit.

16. Thus, the district court in *Motta* v. *Resource Shipping & Enterprises, Inc.,* No. 76 Civ. 5217 (S.D.N.Y. 1980), (Tenney, J.) held that a letter from the stevedore's insurer "ratifying" a suit subject to § 33(b) on condition that the insurer approve any settlement, that its "lien" be protected and that it not be liable for attorneys' fees, litigation expenses or court costs, was "an adequate defense to the defendant ship company's claim that the suit was not instituted by the 'real party in interest'." In *Marullo* v. *Rhederei Richard Schroeder, K.G.,* No. 79 Civ. 3757 (S.D.N.Y. 1980), the Honorable Charles Goettel held that an almost identical letter was "probably insufficient" ratification, but held that the same constituted a valid reassignment. The *Motta* decision, which to our knowledge, has not yet been reported, is included as an appendix to this brief.

Respondents contend that since passage of the 1972 Amendments the assignment defense is substantive; that shipowners are entitled to the protection of "their" section of the Act, § 5(b) which specifically provides that suits by employees covered by the Act must be brought "in accordance with the provisions of § 933 of this title." Respondents submit that as a matter of settled rules of statutory construction, the § 5(b) incorporation of § 33(b) admits of no other interpretation than that the Act contains a six month "time bar" which is a constitutive element of the longshoreman's § 5(b) suit; and that it is neither "unreasonable or harsh" (*Rodriguez,* 617 F.2d at 960) that the longshoreman be absolutely divested of the right to bring suit thereafter. This is, moreover, the only reasonable interpretation to be given to § 5(b) and § 33(b) of the Act, having regard to the *real* value of the suit to *him* in the wake of the 1972 Amendments as well as the intention of Congress to diminish the volume of third party suits by longshoremen by that most effective means—vastly increasing compensation benefits.

POINT I

NO CONFLICT OF INTERESTS SUFFICIENT TO AVOID THE EFFECT OF LHWCA § 33(b) CAN EXIST

This case is a matter of first impression and respondents believe that prior precedent is useful, not for purposes of determining what is now law, but in order to understand *why* the law once was unquestionably that § 33(b) was of no effect in any longshoreman's case after *Ryan* indemnity, and at least until amendment to § 933(a) and (b) in 1959; and, further, why there was once, *perhaps,* some justification for excusing compliance with § 33(b) in those LHWCA cases in which indemnity was *not* a factor. In *every* longshoreman's case, after indemnity against stevedores was allowed, there was a conflict of interest between such employee and his employer by virtue of the fact that a suit by a stevedore on a § 33(b) assignment would soon become a suit by such employer against itself.[17] This interests conflict was avoided absolutely in *Czaplicki, supra* by this Court's refusal to give § 33(b) effect in *Ryan* indemnity cases, and to an extent not strictly relevant here, "interests conflict" may have been completely overcome by the 1959 Amendments. Since the *Czaplicki* conflict of interests exception was unquestionably the product of the *Ryan* indemnity action, it cannot have general relevance to § 5(b) cases today, following the legislative repeal of *Ryan,* since in only a few cases can a § 33(b) assignment raise prospect of an employer's suit against itself.

The second consideration which perhaps once justified excusing compliance with § 33(b) was the belief that third parties (who were once in all cases, including those brought

17. Again see, *Ryan,* 324 U.S. at 144-145, (dissenting opinion. Black, J.).

against shipowners, strangers to the Act's coverage) ought not have standing to assert an assignment defense, at least not where it was clear that the employer did not intend, for whatever reason, to sue. This approach, best articulated in *Potomac Electric Power Company* v. *Wynn*, 343 F.2d 295 (DC Cir. 1965), and in *The Owen*, 43 F. Supp. 897 (E.D.Pa. 1942), was clearly also motivated by an appreciation of the importance of the third party action to injured employees, in light of the inadequacy of the benefits the Act formerly provided. Today the Act's benefits are not inadequate and shipowners, as distinguished from other third parties, are no longer strangers to the Act's coverage.

Petitioners' argument for a presumed[18] conflict of interest sufficient to avoid application of § 33(b) is said to rest upon this Court's decision in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD", supra.* In fact, petitioners fundamentally misunderstand that decision by failing to appreciate that the case was inextricably bound up with *Ryan* indemnity, and the significance of the fact that the Court, aware of the post-*Ryan* interests conflict problem, proceeded with greatest caution in achieving a result in conflict with the clear provision of an Act of Congress. This is plain from the fact that the Court, far from establishing this exception as a presumption to be grafted onto § 33(b) in every LHWCA case,[19] noted that "normally, [the employee's] interest will not be inconsistent with that of the assignee" (351 U.S. at 531); and specifically predicated its decision on the "peculiar facts" therein (at

18. Because they failed to adduce any competent evidence establishing that an interests conflict exists, petitioners, perforce, rely upon a *presumed* conflict said to exist by virtue of the "fact" that stevedore employers will not bring suit against shipowners for fear of antagonizing their customers. (Petitioners' Brief, pp. 6-7).

19. The LHWCA was extended to private employees in the District of Columbia by Act of May 17, 1928, 45 Stat. 600. See, D.C. CODE ANN. § 36-501.

533)—*viz.* that the vessel owner and employer were each insured by the same insurance company. The fact that it was left to the Third Circuit Court of Appeals in *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) to *presume* a conflict of interest in *all* third party suits to which *Ryan* applied is testimony to this Court's caution, when required to do so in order to achieve a necessary[20] result, in ignoring the unequivocal language of an Act of Congress.[21]

But the post-*Czaplicki* characterization of the conflict of interest exception as a rebuttable presumption in *Johnson* v. *Sword Line, Inc., supra,* was *also* wholly motivated by concern for the effect of *Ryan* on the third party suit. Indeed, the *Johnson* court's decision (257 F.2d at 545-546) leaves no doubt that it was based entirely upon the *unavoidable* conflict of interest resulting from the combined effect of *Ryan* and § 33(b) as it then read. *Johnson* was decided in 1958, prior to Congress' 1959 Amendment to § 33(b) deleting the automatic assignment provision and providing for the six month "grace" period following an award. It is surely arguable that, by this enactment alone, Congress intended to overcome the problem addressed in *Czaplicki* and *Johnson* by affording to the longshoreman himself means of avoiding the statutory assignment (by instituting suit within the six month period) and thereby obviating need for

20. Necessary (a) because of the formerly inadequate level of benefits and the interests conflict problem created by the 1938 Amendments to § 33(b) *and* (b) because the Court's preliminary approach, reflected in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) and *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 412 (1953), excluding the possibility of any § 33(b) conflict, by proscribing contribution from a stevedore to a shipowner (*Halcyon*) and guaranteeing even a negligent stevedore recovery of its "lien" (*Pope & Talbot*), worked, but only at the expense of imperiling the safety of longshoremen.

21. The Court's restraint in *Czaplicki* is especially noteworthy when it is recalled that the Court was being asked to rectify a conflict which could not be said to have been within the contemplation of Congress when § 33(b) was enacted, having arisen by reason of judicial (*Ryan*) rather than legislative action.

its avoidance by means of a presumption of conflict of interest. In any event, Congress unquestionably destroyed any remaining basis for the interests conflict exception as a rebuttable presumption by the 1972 legislative repeal of the *Ryan* indemnity right.[22]

Respondents submit that not only is the particular conflict of interest asserted by petitioners insufficient to avoid giving effect to the Act's assignment provision, but that a conflict of interest is *never* sufficient to do so. Respondents content no less than that the 1972 Amendments to the Act clearly indicate that the conflict of interest exception, even on facts akin to those presented by *Czaplicki*—where by virtue of the fact that the § 33(b) assignee is also the § 5(b) "vessel," suit on the assignment will not be brought—can no longer serve to avoid the assignment provision of § 33 (b). As this Court held recently in *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), Congress in 1972 codified this Court's decisions in *Reed* v. *Steamship Yaka,* 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731 (1967) as part of § 5(b) of the

22. What remains as a conflict of interest in the typical case, where the longshoreman's employer is an independent contractor, is the alleged motive of stevedores not to antagonize their customers. This argument was dealt with in *Hernandez* v. *Costa Armatori, S.p.A.,* 467 F. Supp. 1064, 1067 (EDNY 1979) in which the district court held:

> "Here plaintiff claims that the stevedore was naturally reluctant to bring action against the vessel owner for 'fear of damaging customer relationships.' *But this is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme.* Presumably every stevedore would prefer not to give offense to its customer." (Emphasis added).

This holding was affirmed by order of the Second Circuit Court of Appeals on March 19, 1980 for the reasons stated in *Rodriguez.* 622 F.2d 573.

Act.[23] It would seem that since Congress specifically allowed suit by an LHWCA employee against his employer, *qua* shipowner, yet required that suit, too, to be "in accordance with" § 33(b), that Congress intended the § 33(b) assignment to be given effect notwithstanding the existence of a conflict of interest, guaranteed to exist in every such § 5(b) case. From this, it must be assumed that Congress was prepared to tolerate whatever conflicts of interest remained after the repeal of *Ryan* because of the longshoreman's ability to *prevent* such conflict from arising by instituting suit in his own name within six months of receiving an award.

23. Utilizing negative language, Congress provided: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 U.S.C. § 905(b). A review of the accompanying Congressional documents confirms that Congress intended "to treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury in its capacity as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading or unloading services." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 265. See, also, S. REP. NO. 92-1125, at 11-12 (1972).

POINT II

PETITIONERS DID NOT REGAIN THE RIGHT TO BRING SUIT IN THEIR OWN NAMES BY REASON OF THE STATUTORY ASSIGNEES' FAILURE TO BRING SUIT.

Petitioners' argument that suit may be instituted in the names of the injured longshoremen after expiration of the § 33(b) six month period "whenever it is evident that the employer, for whatever reason, does not intend to bring suit" (Petitioners' Brief, p. 17) depends entirely on the decision of the District of Columbia Circuit Court in *Potomac Electric Power Company* v. *Wynn, supra,* and (although not cited) upon *The Owen, supra.* These cases were motivated by "no standing" considerations: that there was no reason for third parties to be concerned whether they were sued by the employer *or* the employee. That these decisions were also based on concern for the inadequacy of the then existing compensation benefits is also apparent.

Potomac did not involve a maritime employee and the provisions of the LHWCA therefore applied only by extension of the Act's coverage to private employers in the District of Columbia. Hence, this Court's decision in *Ryan* and issue of a *Ryan* indemnity interests conflict were not properly a factor in the court's decision to deny effect to the assignment provision. While admitting of the absence of a conflict of interest,[24] the court nevertheless held that

24. The majority opinion alluded to a possible conflict of interest raised by counsel's suggestion that the employer had failed to sue because he feared a *Ryan*-type indemnity action. But the court concluded that "unlike *Czaplicki,* the record does not support the sole inference that the employer (or his subrogee) refused to sue the third party because its interests were identical with that party and opposed to the employee's . . . [*I*]*t is equally plausible from the record before us that the employer sincerely believed that PEPCO was not liable for the employee's injury.*" *Potomac,* 343 F.2d at 297 (emphasis added).

"the Act's purposes to benefit the employee, as interpreted by *Czaplicki,* and supplemented by the 1959 Amendments" (*Potomac,* 343 F.2d at 298) could only be served by interpreting the employer's declination to sue as a "waiver" of the statutory assignment operating in favor of the employee (*Id.*).

Potomac would surely appear to have been wrongly decided. It disregarded entirely the plain language of § 33(b) by effectively giving employees and employers a concurrent right to sue after the six month period, notwithstanding that § 33(b) provides for assignment of "*all* right" of action to the employer after such time. More importantly, it purported to "build" upon this Court's *Czaplicki* decision, despite the fact that *Czaplicki* had no application whatsoever in the absence of the *Ryan* indemnity action which was only available to shipowners.

But in terms of the 1972 Amendments to the Act, upon which the decisions in the cases before this Court must, of course, be based, *Potomac* is not so much wrong as utterly irrelevant. The "purposes of the Statute" considerations which the *Potomac* court brought to § 33(b) manifestly did *not* include those purposes which might have had effect on the rights of third parties. Properly so; third parties were not included in the Act's coverage in 1965. Potomac Electric Power Company *is still not* a party to Act. But shipowners *are.* Section 5(b), requiring that a longshoreman's suit be "in accordance with" § 33 of the Act, applies to "a vessel" and no amount of stretching of the Act's definition of that term[25] can make a public utility "a vessel." Thus, *Potomac, supra,* is totally irrelevant; and so is Petitioners' argument that *Potomac* is a part of the "delicate balance" (Petitioners' Brief, p. 23) with which this Court was concerned in *Edmonds, supra.*

The Fourth Circuit Court of Appeals' decision in *Caldwell* v. *Ogden Sea Transport* echoes *Potomac* in its commit-

25. 33 U.S.C. § 902(21).

ment to "building on (sic) the fundamental point in *Czaplicki*" which is said to be "that notwithstanding a statutory assignment of the longshoreman's right of action, that right may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason" (*Caldwell,* 618 F.2d at 1046). *Caldwell* is, of course, a more sophisticated version of *Potomac* since it recognizes that the vessel owner has, at the very least, a valid defense in the face of a § 33(b) assignment by virtue of Rule 17(a) Fed.R.Civ.P. But the court's characterization of that defense as procedural only (and therefore easily overcome) is unquestionably designed to effectuate the *Potomac* result, without denying due process to the statutory assignee, or permitting the shipowner to face multiple liability on the same claim.

The *only* basis for characterizing the assignment defense as procedural only—a characterization which ignores the plain words of § 5(b) that third party suits must be brought "in accordance with section 933 of this title"—is a perception that *any* restriction on the third party suit cannot be tolerated. This perception rests, in turn, upon a more fundamental evaluation of the third party suit as being salutary to the longshoreman, and hence not to be limited under any circumstances.[26]

---

26. As the *Caldwell* court explained:

> ". . . Ordinarily, therefore, it is likely that the interests of both longshoreman and assignee in having their substantive rights pursued and of the third person in facing a single action will be achieved under LHWCA.
>
> But LHWCA does not yet deal directly with certain practical problems that may interrupt or wrench these expectations. These can arise whenever by design or inadvertence the longshoreman fails during the statutory period to prosecute the claim while the right of action is exclusively his. Following this failure, the assignee may, for a variety of reasons, not then itself prosecute the claim. It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may

Thus, the *Caldwell* court assumed that a "solution" should be found to enable the longshoreman who has failed to sue within the six month period to pursue his former right of action. Its analysis fails to admit of the possibility that Congress did indeed intend "that the longshoreman's substantive right might be lost" (618 F.2d at 1045) through the *combined* inaction of the employee (who fails to bring suit within the time period afforded by the Act) and the statutory assignee; that the incorporation by Congress of § 33(b) into § 5(b) does "deal directly" (*Id.*) with the *legal* problem created by a longshoreman's failure to sue; and that the 1972 Amendments were intended to provide shipowners with a substantive defense where suit is brought other than in the name of the statutory assignee. The *Caldwell* court, compelled by a special "vision" of the third party suit, which in no way accords with Congress' objectives in enacting the 1972 Amendments, nor with the real achievements of the third party suit as it exists today, created a "solution" to the assignment "problem" which effectively does away with the assignment defense.

Respondents contend that there is no reason for this Court *not* to interpret § 5(b) as it was enacted by Congress. Congress specifically provided that § 5(b) suits be brought

---

have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar. Under all of these, and to precisely the same degree under all, *the longshoreman faces a practical problem for which LHWCA provides no direct solution: forcing action by the assignee, or somehow retrieving the right of action. While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply through inaction of the assignee until the claim is barred from prosecution by anyone. What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason.*" 618 F.2d at 1045 (emphasis added).

"in accordance with" § 33 and this Court, as it recently noted in *Director, Workmen's Compensation Programs* v. *Rasmussen,* 440 U.S. 29, 47 (1979), is bound by what Congress has said:

> "Congress has put down its pen, and we can neither rewrite Congress' words *nor call it back 'to cancel half a line.'* "[27] (Emphasis added).

Moreover, the "in accordance with" provision of § 5(b) was drawn in anticipation of suits under § 5(b) against shipowners who under the Act are also employers, which means no less than that Congress intended that the six month provision in § 33(b) be a constitutive element of the longshoreman's § 5(b) action, making claim to non-compliance with § 33(b) a matter of substance rather than procedure. This conclusion is compelled because of Congress' clearly expressed intention in 1972 that "the rights of an injured longshoreman . . . should not depend on whether he was employed directly by the vessel or by an independent contractor." H. R. REP. NO. 92-1441, at 7. If the assignment defense is treated as procedural only, the employee of an independent contractor will be able to overcome it by the procedural devices of Rule 17(a) Fed.R.Civ.P., but the employee of a stevedore/vessel owner will not.[28] Such result would conflct with the "equal rights" standard espoused by Congress in 1972.

---

27. This dictum is but one example of this Court's well-established rule of statutory interpretation as enunciated in *United States* v. *Standard Brewery,* 251 U.S. 210, 217 (1920): "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. *If that be plain, it is the duty of the courts to enforce the law as written,* provided it be within the constitutional authority of the legislative body which passed it." (Emphasis added.)

28. Obviously, in the latter situation, the statutory assignee will *not* agree to ratify or reassign the cause of action or consent to be joined as a party plaintiff. And it is unlikely that it could be joined as an involuntary plaintiff *against itself* under Rule 19 Fed.R.Civ.P.

Ordinary rules of statutory interpretation require this result, but to the extent that this Court will be assisted by considerations outside the plain language of the Act, it is appropriate to proceed to consider the objectives of Congress in enacting the 1972 Amendments. Of the highest priority was Congress' desire to promote on-the-job safety for longshoremen. Since the third party suit today may tend to promote *unsafe* working conditions (see *infra* at pp. 38-43), this Court need not feel any reluctance to strictly abide by the language of § 33(b) and § 5(b) of the Act and to hold that the assignment defense is substantive.

An equally clear objective of the 1972 Amendments was to greatly increase the amount and range of compensation benefits payable, and, by correspondingly diminishing the value of the third party suit to the longshoreman, to make compensation the preferred means of making an injured longshoreman whole. See *Canizzo* v. *Farrell Lines, Inc.*, 579 F.2d 682, 687-88 (2d Cir. 1978, dissenting opinion, Friendly, J.) and, by so doing, to reduce the swell of litigation. Again, it is wholly consistent with this objective to place upon Congress' incorporation of § 33(b) into § 5(b) an interpretation which treats the six month provision as a "time bar" with respect to suits brought in the name of the longshoreman. The employee who fails to sue within the given period is likely to be one whose injuries have been fully compensated and/or who is without a valid claim against the shipowner as recognized by the amended Act (limiting the third party suit to ship's negligence). In sum, a restriction on the third party suit is properly to be judged by the extent to which these suits achieve the results which Congress intended them to achieve: to provide additional compensation to the injured man through an award of damages and to encourage safety. Longshoreman's § 5(b) cases today may typically do neither.

POINT III

CONSIDERATIONS OF POLICY SHOULD LEAD THE COURT TO CONSTRUE § 5(b) ACCORDING TO ITS UNAMBIGUOUS TERMS

A. A Comparison of Benefits Available Under the Act and Recoverable Damages

The value of the third party suit *to the longshoreman* has been significantly diminished by virtue of the combined effects of (a) the 1972 Amendments to the Act, which vastly increased compensation benefits payable by his employer and (b) judicial interpretation of the manner in which any recovery in the action is to be distributed among the three "interested" parties: the longshoreman, his attorney and his employer (or its compensation carrier).

The Act extends benefits today of unprecedented generosity. The present maximum is $426.26 per week, 200% of the national average weekly wage, (§ 6(b)(1)(D)), subject to which an injured longshoreman is entitled to 66⅔% of his average weekly wages in calculating benefits for permanent total disability § 8(a), temporary total disability § 8(b) and permanent partial disability § 8(c). The Act also provides temporary partial disability benefits, based on two-thirds of any reduced earnings capacity caused by an injury § 8(e).[29] Permanent partial disability under § 8(c), the additional benefits which petitioners herein received under the "awards" which triggered the

29. Temporary partial disability benefits under § 8(e) are limited to a specific duration and are payable ". . . during the continuance of such disability, but shall not be paid for a period exceeding five years."

§ 33(b) assignments,[30] are cumulative of those payable under §§ 8(b) and (e). As a result of this spectrum of benefits the Act, as interpreted liberally by the OWCP, extends the very real prospect of a compensation entitlement significantly greater than what, in a typical case, a longshoreman can prove in way of special damages. In addition, § 8(c) benefits for permanent partial disability are properly comparable to general damages while death benefits under § 9(b) extend compensation where no damages would be recoverable.

Any plaintiff claiming damages in a third party suit for lost future wages can recover only those sums which he can prove might reasonably be expected to be lost, not until the end of his life, but to the end of his work-life expectancy. But under the Act, § 908(a) total disability benefits at the rate of an employee's average weekly wage shall be paid ". . . during the continuance of such total disability." This would seem to admit of no interpretation other than entitlement for life, not to age 65 or some other time which provides basis for estimate of work-life expectancy.[31]

---

30. The compensation benefits paid to petitioners Rodriguez and Perez may be seen as deceptively low, in view of the fact that wage rates in the port of New York and elsewhere have risen dramatically since 1973 when their benefits, based on their wages at the time of injury (1973) were calculated. For the contract year beginning October 1, 1980 longshoremen in New York, the Atlantic and Gulf coasts are paid $11.60 per hour and are entitled to guaranteed annual income ("GAI") by virtue of the collective bargaining agreement if enrolled in the GAI plan. Enrollment depends upon having worked 700 hours in the year prior to the beginning of the existing contract. The income guarantee is for 2080 hours and amounts to $24,128 yearly, making a GAI longshoreman's benefits more than $300 per week.

31. So generous are the benefits for permanent disability under the Act that, even in the case where a longshoreman recovers damages in the third party suit, he is entitled to claim "deficiency" compensation after "exhaustion" of the *net* third party recovery, § 33(f)

By virtue of the Court's recent decision in *American Export Lines, Inc.* v. *Alvez,* —— U.S.——, —— S.Ct.——, 64 L.Ed.2d 284 (1980) a longshoreman's wife may recover damages in her own right for loss of consortium. But the Act also extends benefits to wives of longshoremen. The widow of a longshoreman who sustains permanent total disability due to "the injury" and who thereafter dies from causes "other than the injury" (ie., for any other reason) is entitled, should she not remarry, to "50 per centum of the average wages of the deceased . . . during widowhood," § 9(b). These benefits are *not* subject to the disability benefits maximum (now 200% of the national average weekly wage) found in § 6(b)(1). See, *Director, Workers' Compensation Programs* v. *Rasmussen, supra.* Thus, in the case of an injury causing total disability[32] followed

(see also *Nacirema Operating Company* v. *Oosting,* 456 F.2d 956 (4th Cir. 1972) *cert. den.* 409 U.S. 980 and cases cited therein, *Bell* v. *Calumet Harbor Terminals, Inc.,* 6 BRBS 307, B.R.B. No. 76-494 (July 18, 1977) provided that the case proceeds to judgment or his employer consents in writing to the third party settlement, § 33(g). In other words, a longshoreman can assure himself, regardless of the outcome of the third party suit, of whatever he is entitled to in compensation and his third party suit can be, and often is, nothing but a trial balloon. Thus, assuming that a longshoreman has a net recovery equal in amount to his total compensation entitlement, *his* only stake in the third party suit is the amount of interest he would earn on a lump sum damage award which he could, however, also earn on his compensation benefits under § 8(b)(i)(A) and (B) of the Act. Interest on the net judgment or settlement is a double recovery. The real parties with a stake in such action are clearly his employer, whose compensation liability is suspended until "exhaustion" of the net damages recovered, and the longshoreman's attorney. If that employer was, as is typically the case, concurrently negligent, he not only recovers his incurred compensation expense as a "lien" on proceed but is also relieved of future compensation liability.

32. What constitutes total disability for purposes of the Act is, as always, more liberally construed than in suit for damages. Such disability is not measured by physical condition alone. Consideration must be given to an employee's age, education, industrial history and availability of employment which he can perform in making such a determination. *American Mutual Insurance Co. of Boston* v. *Jones,* 426 F.2d 1263 (D.C. Cir. 1970); *Cunnyngham* v. *Donovan,* 328 F.2d 694 (5th Cir. 1964).

by death from another cause, the widow will receive an increase of benefits up to 66⅔% of the employee's wages, if high enough during his employment to have been subject to a § 6(b)(1) maximum.

The Act's benefits also most liberally compensate employees whose injuries cause a permanent or temporary partial disability. Disability under the Act is an economic concept based on a medical foundation, *Perini Corp.* v. *Heyde,* 306 F. Supp. 1321 (D.R.I. 1969). If "disability"[33] is proven, economic loss is presumed, *Travelers Insurance Company* v. *Cardillo,* 225 F.2d 137 (2d Cir. 1955), *cert. den.* 350 U.S. 913 (1955). Thus, in determining disability under the § 8(c) schedule, economic factors are not taken into consideration. *Conteh* v. *Greyhound Lines, Inc.,* 8 BRBS 874, B.R.B. No. 78-365 (Sept. 29, 1978); *Bachich* v. *Seatrain Terminals of California,* 9 BRBS 184, B.R.B. No. 78-289 (Nov. 2, 1978). The economic basis needed in a § 8(c)(21) instance, which like § 8(e) benefits for temporary partial disability requires some proof of economic loss, (§ 8(h)) may properly be only in the nature of diminished opportunity for advancement in the same or related employment, which concept seems grounded upon considerations of competition in the marketplace. See, *Bath Iron Works Corp.* v. *White,* 584 F.2d 569 (1st Cir. 1978). Consideration of marketplace factors would appear dubious in the typical case in view of the unioniza-

33. Typically based on a percentage "loss of use" of the bodily member involved which is often expressed in terms of ranges of motion, sometimes but not necessarily based on the American Medical Association's "Guides to the Evaluation of Permanent Impairment." *Tangorra* v. *Nat'l Steel & Shipbuilding Co.,* 6 BRBS 427, B.R.B. No. 76-328 (Aug. 15, 1977). Neither medical testimony of permanent partial impairment *nor* evidence of economic loss as a result need be adduced. The OWCP can rely on subjective complaints of pain. *Ballard* v. *Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 676, B.R.B. 77-875 (Aug. 15, 1978); *Amato* v. *Pittston Stevedoring Corp.,* 6 BRBS 537, B.R.B. No. 76-348 (Aug. 29, 1978).

tion of longshoremen and the fact that job competition is based only on seniority as that plays a role in employment at the hiring hall. In view of the paucity of proof of financial loss required, permanent partial disability under the Act seems suspiciously akin to an award of general damages for loss of enjoyment of life or physical impairment, a fact perhaps best shown by the parallel availability of benefits under § 8(e) for temporary (up to five years) partial disability in which case, unlike those benefits available under § 8(c), for permanent partial disability, diminished earnings need be shown.

In terms of the amount and range of compensation available, benefits under the Act at least rival those recoverable in suits for damages. Unlike suits to recover damages, there is a statutory presumption that any claim comes within the provisions of the Act and is, therefore, compensable, § 20(a). Further, the fact that an injury or death occurs "in the course of employment strengthens the presumption that it arises out of the employment, with doubts resolved in the claimant's favor." *Vendemia* v. *Cristaldi*, 221 F.2d 103, 105 (D.C. Cir. 1955). Moreover, this statutory presumption means that death or injury resulting from aggravation of a pre-existing condition is compensable unless there is "substantial evidence" to show that such injury was *not* aggravated or precipitated by a work-related factor. *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Independent Stevedore Company* v. *O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rasinski* v. *I.T.O. Corp. of Baltimore*, 7 BRBS 1012, B.R.B. No. 77-277 (Feb. 28, 1978). See also, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). Indeed, a covered employee can establish a new claim for compensation if some disability is caused by an "injury" consisting of nothing more than an episode of disabling pain caused wholly by an underlying, pre-existing condition. *Adkins* v. *Safeway Stores, Inc.*, 6 BRBS 513,

B.R.B. No. 76-317 (Aug. 23, 1977). The Act in all cases is to be liberally construed and when credible proof of disability is offered, even through subjective complaints only, the OWCP *must* award benefits. *Ballard* v. *Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676, B.R.B. No. 77-875 (Aug. 15, 1978); *Ruiz* v. *Universal Maritime Service Corp.*, 8 BRBS 451, B.R.B. No. 78-135 (May 30, 1978); *McIntosh* v. *Parkhill-Goodloe Co.*, 4 BRBS 3, B.R.B. No. 75-263 (May 17, 1976), aff'd mem. 550 F.2d 1283 (5th Cir. 1977), *cert. den.* 98 S.Ct. 766 (1978). Of course, contributory negligence is no factor.

Because of the vastly increased amount and range of benefits payable under the post-1972 Act, and because the longshoreman is not permitted a double recovery,[34] the amount of damages *he* can recover in a third party suit is of course less today than prior to the Amendments. Moreover, by virtue of the apportionment of the "recovery fund" by this Court's decision in *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) and the Second Circuit Court of Appeals' decision in *Valentino* v. *Rickners Rhederei G.M.b.H.*, 552 F.2d 466 (2d Cir. 1977), this Court should consider the very serious possibility that the longshoreman in a typical suit brought today will benefit *not at all* by bringing the third party suit.

In *Valentino*, a case involving a verdict less than the "lien" for compensation benefits paid by the employer, it was held that the attorney was entitled to take his entire fee out of the verdict, with the remainder going to the stevedore employer. The longshoreman, of course, received nothing. The district court also held (*Valentino* v. *Rickners Rhederei G.M.b.H.*, 417 F.Supp. 176, 179 (E.D.N.Y. 1976)), and the Court of Appeals specifically affirmed (552 F.2d at 470, n. 5), that the attorney coud not "share" any part of his fee with his client, the longshoreman, because Ethical Con-

34. *The Etna*, 138 F.2d 37 (3rd Cir. 1943).

sideration 3-8 of the Code of Professional Responsibility prohibits a lawyer from sharing legal fees with a layman.[35]

In *Bloomer,* this Court dealt with the situation where the recovery exceeded the lien and, specifically, with whether the stevedore employer could recover its entire lien free of any litigation expenses. The disposition of the Court allowed the longshoreman's attorney to take a one-third fee, based on a contingent fee retainer agreement, from the *gross* settlement and did not require the employer to contribute at all to the fee from its "lien."[36]

The *Bloomer* decision was apparently motivated by this Court's desire to place this so favored class of workmen in no better position than ordinary litigants. 63 L.Ed.2d at 222. Putting longshoremen in the same position as ordinary litigants *requires* that the attorney take his fee from the gross verdict and that such fee be borne by the longshoreman alone, at least in every case where the judgment or settlement is large enough so that this result can be achieved—*even if this requires the longshoreman to pay to his attorney the last cent of any excess.*[37] The practical effect of *Bloomer* on a longshoreman's recovery in a third party suit is the following: in any case where the attorney's

35. The Court of Appeals also pointed out that such fee-splitting "would open the way for an end-run around the rule that the stevedore must be paid in full before the longshoreman receives anything." (552 F.2d at 470, n. 5).

36. The Court specifically excepted the *Valentino* situation from this rule, see *Bloomer,* 63 L.Ed.2d at 226, n. 13.

37. This is easily demonstrated by the following example: Verdict of $60,000.00; compensation benefits: $40,000.00. Attorney receives fee of $20,000.00; stevedore receives remaining $40,000.00 in satisfaction of its lien and plaintiff longshoreman receives *nothing* out of the law suit. But he has already received $40,000.00 in benefits and is therefore, in the *same* position as an ordinary litigant who has *not* received compensation and has retained $40,000 out of a $60,000 recovery after payment of his attorney. In addition, this result avoids the "end-run" with which the Second Circuit Court of Appeals in *Valentino* was concerned. The stevedore is paid in full before the longshoreman receives anything (*Valentino,* 552 F.2d at 470, n. 5).

fee is 33⅓% and where the stevedore has a "lien" on the proceeds of suit, such suit can result in an *actual* recovery by the longshoreman *only* if the verdict or settlement amount exceeds compensation benefits paid by *more* than 50%.[38]

By virtue of its recent decision in *Norfolk & Western Pacific Railway Co.* v. *Lipelt*, —— U.S. ——, 100 S.Ct. ——, 62 L.Ed.2d 689 (1980), which requires deduction of a plaintiff's tax liability from any damage award for lost wages in a personal injury case, the Court has further "narrowed the gap" (See *Bloomer, supra*) between a longshoreman's damage recovery and his tax-free compensation benefits.

If a longshoreman exhausts his compensation remedy, which he, of course, now may do without imperiling his right to sue because of the § 33(b) six month "grace" period; and if this results in payment of compensation which is two-thirds of his reasonable expectancy in way of a damage recovery; and if for this, or any other reason, suit is not brought within the six month period, a *Caldwell* result will benefit not longshoremen, but lawyers—those representing longshoremen *and shipowners*. Under *Valen-*

38. In *Bloomer*, the settlement amount was sufficiently large that the attorney's fee did not seem an awkward percentage of the longshoreman's net recovery because plaintiff was compensated only to the extent of receiving free medical care and income replacement for the period of his total disability after the occurrence of what appears to have been a serious back injury. There is no specific "schedule" under § 8(c) for back injury. However, if plaintiff sustained an injury to his back which caused him to lose time from work after he ceased to be totally disabled, he would have had opportunity to make claim for impairment of earning capacity under § 8(c)(21) or § 8(e). He apparently did not, which may mean that a longshoreman claiming a permanent injury got benefits on basis that only a temporary injury had been sustained. There has been a documented tendency in the past for longshoremen's attorneys to lead injured employees away from compensation, in order to preserve the "value" of the third party case. This practice was specifically deplored by Congress. See, H.R. REP. NO. 92-1441 at 5. It is perhaps significant that in the *Caldwell* group of cases, not one injured longshoreman sought an award of benefits on basis of claim of having sustained a permanent impairment.

tino, a longshoreman's lawyer recovers in such case whether or not the judgment exceeds the "lien" and the alleged "plaintiff" would be but a stalking horse for the attorney's interest and that of a likely negligent stevedore.

B. The Role of the Longshoreman's Third Party Case in Promotion of Safety

Congress identified certain objectives to be met by the 1972 Amendments, among which were to more adequately meet the compensation needs of injured employees and their families and—by assuring that the employer bear the compensation cost of unsafe conditions—to strengthen the employer's incentive to provide the fullest measure of on-the-job safety. H.R. REP. NO. 92-1441, "Purpose and Background of Legislation" at p. 1. In the same document, in a discussion entitled "Elimination of Unseaworthiness Remedy," Congress acknowledged that:

> "... the number of third party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could be better utilized to pay improved compensation benefits were being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in those cases. (*Id.* at 5.)

Congress in the same document also indicated that nothing in the Act was intended to relieve "any vessels or other persons" from their duties under the Occupational Safety and Health Act of 1970,[39] 29 U.S.C. § 651 *et seq.* and that

39. The reference to vessels encompasses instances where the vessel is also the employer. The Occupational Safety and Health Act of 1970, through 29 C.F.R. § 1918 *et seq.*, the Safety and Health Regulations for Longshoring, applies to the employer. See 29 C.F.R.

it stood ready to ". . . immediately reexamine the whole third party suit question if it appears that the changes made in the present law have [adversely] affected progress in improving occupational health and safety." (*Id.* at 8).

It is axiomatic that an employer cannot be made to bear the cost of unsafe conditions if it or its insurer has a "lien" on the proceeds of a longshoreman's suit irrespective of the employer's negligence, at least if the scope of the shipowner's duty to longshoremen is not to be limited in a fashion designed to prevent just that result. It is further obvious that in terms of financial incentive, third party cases, (at least those involving negligence *per se* or statutory negligence by stevedores who fail to observe the safety precautions mandated by the Act's § 41 and the Safety and Health Regulations for Longshoring) will "relieve" stevedores from compliance with those regulations, designed to promote the safety with which Congress was concerned.

Longshoremen hurt on the job are, in instances where third party rights are involved, overwhelmingly injured aboard ships where they are typically at work with ship's gear. Few classes of workmen are engaged in situations which so readily lend themselves to "third party" liability and with that, especially in light of § 41 and the regulations, circumstances in which the employer *and* the third party may both be "negligent." In recognition of these facts, and of the need to prefer the safety of longshoremen to all else, this Court in 1956 in *Ryan* v. *Pan-Atlantic S.S. Corp., supra,* gave shipowners a right of indemnity. One purposeful effect of this decision was to make the party in the best position to prevent the occurrence of a longshoreman's injury, usually the stevedore, pay the entire loss (see, *Italia Societa Per Azioni Di Navigazione* v. *Oregon*

§ 1918.1; *Albanese* v. *N.V. Nederl. Amerik Stoomy. Maats.*, 346 F.2d 481 (2d Cir. 1965) rev'd on other grounds, 382 U.S. 283 (1965); *Bernardini* v. *Rederi A/B Saturnus,* 512 F.2d 660, 664, n. 6 (2 Cir. 1975). "Other persons" referred to by Congress means independent contractor stevedores.

Stevedoring Company, Inc., 376 U.S. 315 (1964)). Another was to make question of shipowner negligence largely *irrelevant.* This for reason first of the fact that shipowner's liability was overwhelming also predicated on unseaworthiness, or was based on unseaworthiness alone.[40] And, secondly, since neither the existence of an unseaworthy condition nor shipowner's negligence constituted, without more, a bar of recovery of indemnity from the stevedore,[41] shipowners' liability in the only *real* sense of that word, i.e. *ultimate* liability, depended not upon whether they were negligent or their vessels unseaworthy, but upon whether stevedores were or were not guilty of a breach of warranty. Under *Ryan* indemnity, shipowners as a practical matter were liable *only* when the stevedore *was not* negligent.

The work situation aboard ships has, of course, not changed and exactly the same potential for joint "negligence" exists today as it did under *Ryan* and, of course, before that time. Nonetheless, in at least the majority view of what constitutes negligence in § 5(b) cases, shipowners, who are often in by no means the best position to prevent accidents to longshoremen and whose "negligence" is but *a* proximate cause (and often marginally today routinely face liability for not only a longshoreman's damages,[42] if any, but for the compensation liability of the

40. As was once observed: "[i]t is hard to imagine . . . how an owner could be negligent, if the ship was not unseaworthy." *Spano* v. *Koninklijke Rotterdamsche Lloyd,* 472 F.2d 33, 35, n. 1 (2d Cir. 1973).

41. See *Italia Societa Per Azioni Di Navigazione,* 376 U.S. at 320; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.,* 355 U.S. 563, 568 (1958); *McNamara* v. *Weichsel Dampfschiffahrts AG Kiel, Germany,* 339 F.2d 475, 478 (2d Cir. 1964).

42. "Damages" in this context should be understood as those sums which a longshoreman can prove to the satisfaction of the trier of the facts are his damages, for which he neither has, nor can obtain, benefits under the Act.

stevedore, even when *the* proximate fault is unquestionably the latter's.

Ryan indemnity worked, a fact recognized by Congress (H.R. REP. NO. 92-1441) which appreciation, we respectfully submit, was motive for the Congressional statement with respect to willingness to reassess the 1972 Amendments in light of their effect upon safety. The concern of Congress for the safety of longshoremen can be effectively served only: (1) by defining a shipowner's duty to longshoremen as extending only to those instances where either a "workmanlike"[43] or "non-negligent"[44] performance by the employer would not have prevented the occurrence of injury or (2) by separating the question of a longshoreman's right to damages in excess of what he has already obtained or is entitled to receive in compensation, from the shipowner's liability to a negligent stevedore for its compensation liability.

Definitions of the duty of shipowners to longshoremen in terms only of an appropriate *partial* reliance on the stevedore's obligations respecting safety, such as, for example, those found in § 343 and § 343(A) of the RESTATEMENT (SECOND) OF TORTS, (1966)[45] (see, e.g. *Napoli* v. [Transpacific Carriers, Etc.] *Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976)) are doomed to failure, as efforts by courts to reach through proximate fault of a stevedore in order to apprehend a remotely "negligent" shipowner will

43. The warranty of workmanlike service in maritime contracts has been held to exist independent of the *Ryan* indemnity right. *Fairmont Shipping Corp.* v. *Chevron Int. Oil Co., Inc.*, 511 F.2d 1252 (2d Cir. 1975). The 1972 Amendments overruled *Ryan* ". . . insofar as . . . [it] made an employer circuitously liable by . . . allowing . . . the vessel to maintain an action for indemnity against the employer." *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106, 113, n. 6 (1974).

44. As defined, at least principally, by § 41 of the Act and the Safety and Health Regulations.

45. Sections 343 and 343(A), in the context of the regulations and the stevedore's obligation under its warranty to "stop work" in the face of known unsafe conditions, to which "open and obvious" conditions these sections by their terms apply, make a shipowner's liability derivative of a breach of duty by the stevedore.

increasingly enhance the prospect of a longshoreman's recovery and, with that, the recovery by that negligent stevedore of its "lien." Yet despite the obviousness of the relationship between promotion of safety, considerations of the shipowner's duty and the question of a negligent stevedore's "lien" rights, courts persist in justifying expansive notions of when longshoremen may recover for shipowner's "negligence" upon considerations of safety, while at the same time acknowledging a negligent stevedore's alleged right to be made whole. Since it is possible that the present law actually requires a partially "negligent" shipowner to bear the "whole load" of third party damages by requiring reimbursement of a negligent stevedore, (see, *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714, 724 (2d Cir. 1978)) this Court must consider the resulting possibility that longshoremen's cases, if brought and if successful, will serve to undermine the stevedore's concern for safety; and because the stevedore has typically the best opportunity to prevent injury to its employees, that the interests of longshoremen as a group may not be served by the bringing of marginal liability (i.e. remote shipowner negligence) third party actions.[46] Suits brought by longshoremen beyond the six

46. Whether allowing a negligent stevedore to recapture its compensation liability need be seen as a requirement of the "delicate balance" of law existing in 1972 would depend on whether this Court would, in some future case, view the *Pope & Talbot* holding allowing such result to have been, like *Czaplicki*, a conflict of interests matter, and whether that case can be reconciled with *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.* 394 U.S. 404 (1969). An answer to the latter question as to whether these cases can be reconciled might be suggested by considering the holdings of the district court and court of appeals in *Joyner* v. *F&B Enterprises, Inc.*, 448 F.2d 1185 (DC Cir. 1971) in light of this Court's *Federal Marine Terminals* holding that the Act never "cut off" a stevedore's common law right to sue a third party to recover its compensation liability occasioned by the latter's fault. The stevedore's "lien," after all, was thought to be required in order to prevent a double recovery by the longshoreman *and* because stevedores, after the 1938 Amendments, in any case where there was no award, were *mistakenly* thought to be "without redress." See, *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952, Weinfeld, J.), aff'd *sub. nom.* 205 F.2d 151 (2d Cir. 1953); *The Etna*, 138 F.2d 37 (3rd Cir.

month provision of § 33(b) are more likely to be of that kind.

1943). If the alleged "lien" rule was not part of the balance, and, of course, negligent stevedores between 1956 and 1972 did *not* escape their compensation liability, the question might be whether a "lien" is required today because § 905(b) overrules *Federal Marine Terminals*. See *Landon* v. *Leif Hoegh and Co. Inc.*, 521 F.2d 736 (2d Cir. 1975) *cert.* sought (on grounds other than argued in District Court and the Court of Appeals) and denied 423 U.S. 1053 (1976) where this was suggested but not held. But see, also, *Dobbins* v. *Crain Bros., Inc.*, 567 F.2d 559, 565, n. 10 (3rd Cir. 1977). Perhaps an argument from the language of § 5(b) might be made that the 1972 Amendments overruled *Federal Marine Terminals*. The record of hearings before Congress and the Congressional documents, however, indicate the question was never considered, although as was pointed out in *Bloomer* (63 L.Ed.2d at 224 n. 10) the proscription against double recovery was commented upon in the 1972 Congressional hearings, as it had been previously, at the time of the enactment of the 1959 Amendments. To the extent, if at all, that the "lien" may be properly something more than a device to prevent a double recovery, i.e. is a property right of the stevedore in all instances to recover its compensation liability from the proceeds of an employee's suit, the Court should consider Congress' statement of intention that employers bear the cost of unsafe conditions, which seems incompatible with such interpretation of the "lien." The question of the effect of the 1972 Amendments on a stevedore's *Federal Marine Terminals* right might also properly be considered in light of this Court's justification of the result in *American Stevedores Inc.* v. *Porello, supra* (whence the "lien" problem, if it is such, springs). In that case the Court, mistakenly, in light of *Federal Marine Terminals*, rejected the argument of the stevedore that suit was barred by virtue of a § 33(a) election, since that meant what Congress could not have intended—where there was no award neither the employee nor the employer could sue and, hence, a blameless stevedore would be unable to recoup its compensation expenses. See, *American Stevedores Inc.* v. *Porello*, 330 U.S. at 445. If *Federal Marine Terminals Inc.* was overruled by the 1972 Amendments and the employer has no independent right of suit, it cannot today recover its compensation expense, if there is no award and the employee chooses not to sue. Such result is clearly incompatible with Congress' intention to encourage *voluntary* payments under the Act.

It is apparent that this question is matter for a future case and that this limited discussion is by no means adequate treatment of what may be the *essential* problem in longshoremen's personal injury cases. This footnote is the product of the writers' concern for Code of Professional Responsibility, E.C. 7-23 in light of the hypothetical argument respecting safety made herein, which responds to contrary argument concerning safety made by petitioner (see Petitioners' Brief, p. 9).

V.

Conclusion

By reason of the plain language of §5(b) and the changes in the Act since 1956; and appreciating that there is a distinction in longshoremen's cases today between what benefits longshoremen as opposed to just their attorneys (*Bloomer, supra* 63 L.Ed. 2d, at 225, n. 11); and, finally, in order to serve that objective of workmen's compensation, described during the course of the hearings before Congress in 1972 by the then Secretary of Labor Hodgson, which is to ". . . minimize, not encourge, litigation" (Hearing on H.R. 247 *et al.* before the Select Subcommittee on Labor and Public Welfare, 92nd Cong., 2d Sess., 49), this Court should affirm the judgments of dismissal on ground that the LHWCA provides shipowners a substantive defense barring suit by longshoremen after six months from acceptance of an award of compensation.

Dated: New York, New York
December 22, 1980

Respectfully submitted,

JOSEPH T. STEARNS
Attorney for Respondents
COMPASS SHIPPING CO. LTD.,
DJAKARTA LLOYD, P.N. and
ARYA NATIONAL SHIPPING
LINE, LTD.
40 Wall Street
New York, New York 10005

SANDRA R. M. GLUCK
and WALKER & CORSA
Of Counsel

APPENDIX

Motta v. Resource Shipping & Enterprises Co., 76 Civ. 5217 (CHT)

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 5217 (CHT)

RONALD MOTTA,

Plaintiff,

—against—

RESOURCE SHIPPING & ENTERPRISES CO.,

Defendant.

APPEARANCES

For Plaintiff:

ZIMMERMAN & ZIMMERMAN
160 Broadway
New York, New York 10038
Of Counsel: MORRIS CIZNER, ESQ.

For Defendant:

WALKER & CORSA
40 Wall Street
New York, New York 10005
Of Counsel: JOSEPH T. STEARNS, ESQ.

TENNEY, J.

This case constitutes yet another episode in the enduring struggle to correctly interpret and apply problematic provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (hereinafter referred to as LHWCA or the Act). The question raised here is whether an insurance company to which a long-

shoreman's personal injury claim has automatically been assigned because the longshoreman failed to institute suit within six months of receiving his compensation award, *see id.* § 933(b), can effectively ratify the longshoreman's commencement of a damages action against the shipowner notwithstanding the plaintiff's prior relinquishment of his right to sue. Upon reviewing recent Supreme Court and Second Circuit decisions concerning LHWCA actions and the scope of recovery, as well as the relevant policy concerns, the Court concludes that the insurance company's ratification is an adequate defense to the defendant shipping company's claim that the suit was not instituted by the "real party in interest." Fed. R. Civ. P. 17(a).[1]

Background

On January 12, 1974, the plaintiff Ronald Motta, a longshoreman employed by the Northeast Stevedoring Company ("Northeast"), was injured while working aboard the S/S Ocean Harmonia, a vessel owned and controlled by defendant Resource Shipping & Enterprises Company ("Resource"). Motta filed a claim under LHWCA with the Office of Workmen's Compensation Programs and a formal order was issued on April 16, 1975 granting the plaintiff the sum of $8,199.03. This action was commenced on November 23, 1976, more than six months after acceptance of the compensation award. The defendant thus contended that the suit was barred by section 33(b) of the Act which provides that:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third

> person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b). Relying on *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956) and its progeny, the plaintiff countered that the alleged asignment could be enforced only if the defendant proved that there was "no conflict of interest" between the longshoreman plaintiff and his employer, the stevedore.[2] Before these conflicting claims were resolved, the Court, at counsel's request, decided to delay consideration of the case until after the Second Circuit decided the case of *Rodriguez* v. *Compas Shipping Co.,* 617 F.2d 955 (2d Cir. 1980), *cert. granted,* 49 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 79-1977). *See* Letter to the Court from Joseph T. Stearns, dated, May 16, 1979. *Rodriguez* was decided on March 19, 1980. The court of appeals held that a longshoreman's LHWCA claim was automatically assigned to his employer six months after compensation was awarded even though the award was made in a "settlement agreement" and no formal compensation order was filed. *Id.* at 958-59. In the course of discussing the shipowner's defense that the longshoreman could not institute an action because his claim had been assigned to his employer, the Second Circuit stated:

> The defense raised by the defendants, that plaintiff is not the real party in interest, may always be invoked pursuant to F.R.Civ.P. 17(a), which provides that every action shall be prosecuted in the name of the real party in interest. Without this defense a defendant might be exposed to multiple suits based on the same claim. . . . A person, such as the employer here, to whom a claim has been assigned under § 33(b), is the real party in interest. . . . Assuming the assignment here to be valid, the right to sue is exclusively that of the employer, which

> has not joined in the action *or ratified its commencement* even though it has had a reasonable time to do so. The defense of assignment therefore is properly asserted as a procedural matter by the defendants.

Id. at 958 (citations omitted) (emphasis added). Seizing on the underscored portion of the Second Circuit's statement, Motta procured a letter from Northeast's insurance company asserting that it ratified the plaintiff's commencement of this suit. This letter read as follows:

> We were the Longshoremen's Act Insurer of Northeast Stevedoring Co., Inc., the employer of plaintiff-claimant on January 12, 1974, the date he was injured while working aboard a Resource Shipping Enterprises Co. vessel.
>
> We have your letter dated March 28, 1980.
>
> We hereby ratify plaintiff-claimant's commencement and continuance of his action against Resource Shipping Enterprises Company to recover damages for the personal injuries he sustained as a consequence of the accident.
>
> If our ratification is sufficient to preserve to plaintiff-claimant ownership of the cause of action, we shall, of course, not institute a separate action against Resource Shipping, and we will be bound by any judgment which may be rendered in said action insofar as it determines liability, or lack thereof, for the accident, and the damages recoverable, if any. We understand also that we would be bound by any release executed by the plaintiff-claimant with our approval. Our lien and credit rights are, however, to attach to the proceeds of any recovery by way of judgment of settlement and are not in any way hereby released or relinquished.

Letter to Irving Kernis, Esq. from Raymond Green, Supervising Attorney, The State Insurance Fund, dated May 6,

1980, annexed to Affidavit of Irving Kernis, Esq., sworn to May 9, 1980 ("Kernis Aff.").

In response to this letter, counsel for Resource submitted a lengthy memorandum arguing that ratification was ineffective in this case for the following reasons: (1) the plaintiff had no cause of action because all his rights were assigned prior to the commencement of the suit and thus the "purported ratification" is a "nullity, since the original action was improperly brought in plaintiff's name in the first instance"; Federal Rule of Civil Procedure ("Rule") 17(a) requires that an action be brought in the "name of the real party in interest" and this requirement can properly be ignored only in extraordinary circumstances not present here; (3) the insurance company's cause of action is materially different than the cause of action that is available to a longshoreman for six months from the time the compensation award is accepted; (4) there is, or may be, a defense available to the defendant in an action brought by the insurance company that would not otherwise be available in a suit instituted in the longshoreman's name. Defendant's Memorandum of Law in Support of a Motion to Dismiss Because the Plaintiff Was Not the Real Party In Interest ("Defendant's Memorandum") at 8-9. The plaintiff, apparently content to rely on the insurance company's ratification letter, never bothered to respond to this memorandum or the arguments made therein.

Discussion

As quoted above, the *Rodriguez* court stated that after assignment, "the right to sue is exclusively that of the employer, which has not joined in the action or ratified its commencement even though it has had a reasonable time to do so." 617 F.2d at 958. While this assertion suggests

that the Second Circuit would approve of ratification in LHWCA cases, the Court cannot rely solely on this statement in resolving this issue. The ratification question was not before the court of appeals and Judge Mansfield's observation was not critical to that decision. *See Kastigar* v. *United States,* 406 U.S. 441, 445-46 (1972) (language unnecessary to Court's decision is not binding authority). The Second Circuit has indicated that "a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' where [a court] ... is providing a construction of a statute to guide the future conduct of inferior courts." *United States* v. *Bell,* 524 F.2d 202, 206 (2d Cir. 1975). Statements falling in the latter category are considered "not binding ... [but] must be given considerable weight and can not be ignored in the resolution of [a] close question." *Id.; see Boyd* v. *Henderson,* 555 F.2d 56, 60 n.5 (2d Cir. 1977). Regardless of whether the *Rodriguez* ratification statement is viewed as "obiter" or "judicial" dictum, this Court adopts the view espoused by Chief Justice Marshall that

> general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.

Cohens v. *Virginia,* 19 U.S. (6 Wheat.) 264, 398 (1821) (referring to dicta appearing in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803)). Accordingly, giving due respect to the Second Circuit's reference to ratification in *Rodriguez,* this Court now turns to the arguments raised by the defendant in opposition to this procedure.

I. *Real Party in Interest*

Defendant's first contention is that the purported ratification is a "nullity" because Motta had assigned his rights before the suit was instituted and thus the original action was improperly brought by him in the first place. This argument, however, miscomprehends the final provision of Rule 17(a) which states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As explained by Professor Moore:

> The purpose of the provision is to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. Thus its main thrust is to allow a correction in parties after the statute of limitations has run, despite the valid objection that the original action was not brought by the real party in interest.

3A Moore's Federal Practice ¶ 17.15-1, at 182 (2d ed. 1979) (footnotes omitted); *see Wadsworth* v. *United States Postal Service*, 511 F.2d 64 (7th Cir. 1975); *American Jerex Co.* v. *Universal Aluminum Extrusions, Inc.*, 340 F. Supp. 524 (E.D.N.Y. 1972). The very purpose of Rule 17 ratification, therefore, is to respond to claims like that made by the defendant here. Resource's theory that the ratification is a "nullity" because the suit was originally brought by the wrong party cannot be reconciled with the

underlying rationale of Rule 17. In short, the defendant's first argument is soundly countered by the Rule on which it seeks to rely.

Resource's second contention is that the real party in interest requirement "can properly be dispensed with only in most extraordinary circumstances, not present here." Defendant's Memorandum at 8-9. According to Resource,

> The ratification provision, as opposed to substitution provision, can only be applicable when: (1) no difference results in the nature of the cause of action, its impact on the defendant and on the courts and (2) when the original plaintiff is obliged to sue, or is at the same risk regarding the suit as the real party in interest and (3) the real party in interest is at the same risk as would be the titular plaintiff. Identity of claim and remedy, identity of risk and agreement to abide the event are required before ratification may be permitted.

Id. at 11-12.

The source of the limitations posited by the defendant remains a mystery to the Court. Resource cites no authority to support the rather detailed restrictions it seeks to impose on the ratification provision. *Kenrich Corp.* v. *Miller,* 256 F. Supp. 15 (E.D. Pa. 1966), *aff'd,* 377 F.2d 312 (3d Cir. 1967), relied upon by the defendant, is inapposite. The *Kenrich* court invalidated an assignment of the claim to the party bringing suit on the ground that the assignment was "champertous and against public policy." 256 F. Supp. at 18. According to the court, the assignment neither transferred the actual right of action against the defendants nor gave the assignee the ability to compromise or settle the claim. Indeed, the district court found that both the assignor and the assignee retained "alternative rights to prosecute this action at their own expense." *Id.*

And on appeal, the Third Circuit emphasized that under Pennsylvania law, which was applied in this diversity action, the assignment agreement was illegal because it provided for "the institution of litigation by and at the expense of a person who, but for that agreement, has no interest in it, with the understanding that his reward is to be a share of whatever proceeds the litigation may yield." 377 F.2d at 314. In the case before this Court, the insurance company has relinquished its right to bring suit against the shipowner and has agreed to be bound by any judgment or release executed by the plaintiff. Furthermore, in contrast to *Kenrich,* no law prohibits this arrangement. In fact, the LHWCA expressly provides for a longshoreman's suit against the shipowner after the longshoreman has received a compensation award from his employer. The facts and holding of *Kenrich* are thus easily distinguishable from the case at bar.

Resource's reliance on *American Dredging Co.* v. *Federal Ins. Co.,* 309 F. Supp. 425 (S.D.N.Y. 1970), is equally misplaced. In that case, a subcontractor that had been paid by its own insurance company, London Underwriters, for expenses incurred in a building project attempted to sue the insurance companies that had issued a policy to the primary contractor which covered the same loss. The court noted that it was "common in the insurance field" to enter into loan arrangements in which an insurance company advances to the insured the amount of the loss as a loan repayable only out of the proceeds of a suit brought by the insured to recover the loss from the responsible parties. *Id.* at 427. The court continued, however:

> In the case at bar, the loan arrangement between London and plaintiff differs from the usual arrangement of this sort in one important respect. The loan arrangement here does not contemplate suit by

> the assured against the party responsible for the loss in substitution for a suit by the insurer as subrogee. Instead, it was agreed between London and the plaintiff that suit would be brought by the plaintiff assured against the co-insurers for the full amount of the loss paid by London wholly for London's benefit. Yet, London has no right to recover on defendant's policy of insurance as such. The only right which London has against the co-insurers is by way of pro rata contribution. Thus, unlike the subrogation cases, the attempt is made here to confer on London a substantive right to which it is not entitled.
>
> Moreover, if plaintiff were able to recover from the defendant insurers for London's benefit the full amount paid it by London, the defendant insurers in turn would have the right to pro rata contribution from London on the amount paid out to plaintiff by them in satisfaction of the loss. But defendants cannot assert such a claim against London in this suit since London is not a party. Thus giving effect to the device employed here would give rise to multiplicity of litigation.

Id. at 428. The court therefore concluded that the named plaintiff was not the real party in interest and that London would have to pursue its contribution remedy directly against its co-insurers. *Id.* at 429.

Motta's suit, in contrast, represents the "usual arrangement" in which a party reimbursed for its loss by the insurer is "deemed not to have received payment and retains the right to sue in its own named and recover the loss from the party who has caused it." *Id.* at 427. This is precisely the arrangement contemplated by section 33(b) of the Act which provides that the longshoreman can institute suit within six months of accepting a compensation award. The longshoreman is thus the real party in

interest even though proceeds from his suit must be used to reimburse his employer, or its insurance company, for compensation payments. *See Bloomer* v. *Liberty Mut. Ins. Co.*, 48 U.S.L.W. 4211 (U.S. Mar. 3, 1980). Unlike the arrangement invalidated in *American Dredging*, permitting the longshoreman to sue in his own name neither "confer[s] on [The State Insurance Fund] a substantive right to which it is not entitled" nor "give[s] rise to multiplicity of litigation" 309 F. Supp. at 428. The concerns expressed in that decision, and the result reached, are inapplicable to the case at hand.

The gist of defendant's third and fourth objections to allowing ratification in this case is that the insurance company's LHWCA cause of action is "materially different" from the longshoreman's suit and may be subject to a defense that would be unavailable against the longshoreman. These objections are reflected in Resource's assertion that ratification, as opposed to substitution, is appropriate only when "no difference results in the nature of the cause of action" and the original plaintiff and the real party in interest bear equal risks with respect to the suit. While these proposed restrictions are not groundless, they are not compelled by the language or underlying purpose of Rule 17(a) and the ratification provision. Furthermore, Resource has exaggerated the difference between an insurer's suit and a longshoreman's LHWCA suit. Each of these issues will be discussed in turn.

The purpose of the real party in interest rule is to "protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Notes of Advisory Committee, Fed. R. Civ. P. 17 (a), 1966 Amendment. A letter or document that ratifies the commencement and continuation of an action may be

sufficient to cure any real party in interest defects in the suit. *deVries* v. *Weinstein Int'l Corp.*, 80 F.R.D. 452, 459 (D. Minn. 1978); *Clarkson Co.* v. *Rockwell Int'l Corp.*, 441 F. Supp. 792, 797-98 (N.D. Cal. 1977); Wright & Miller, Federal Practice and Procedure: Civil § 1555, at 709. The district court has discretionary authority to determine whether ratification is appropriate in a given case. *James* v. *Nachville Bridge Co.*, 74 F.R.D. 595, 597 (N.D. Miss. 1977); *Southern Nat'l Bank of Houston* v. *Tri Financial Corp.*, 317 F. Supp. 1173, 1188 (S.D. Tex. 1970). This discretion must be exercised in a manner consistent with the Rule's purpose to protect the defendant from subsequent litigation and to finally resolve the dispute at hand. *See James* v. *Nashville Bridge Co., supra,* 74 F.R.D. at 597; *Prudential Lines, Inc.* v. *General Tire Int'l Co.*, 74 F.R.D. 474, 476 (S.D.N.Y. 1977).

The letter of ratification submitted in this case states that The State Insurance Fund, Northeast's insurance company and the real party in interest, ratifies Motta's commencement and continuance of this suit. The insurance company agrees to be bound by any judgment rendered in this action that determines liability and damages. Furthermore, it recognizes that it would be bound by any release Motta executed with the insurance company's approval. It also asserts that it will not institute a separate action against Resource. The State Insurance Fund expressly reserves its lien and credit rights and states that they will "attach to the proceeds" resulting from any judgment or settlement.

The defendant contends that having "nothing at stake in the way of potentially unrecoverable counsel fees and litigation expenses, the insurance company has nothing to lose, yet can control the outcome of the case by withholding any concession of its 'lien.'" Defendant's Memoran-

dum at 3. In Resource's view, ratification would "insulat[e] the insurance company from the need to make any ethical or business judgment on any aspect of this case although it may prove to be, at no risk, the sole beneficiary." *Id.* at 3-4. Resource also asserts that the longshoreman's and the insurance company's LHWCA suits differ "with respect to the burden of counsel fees and the cost of litigation, as well as in regard to distribution of any proceeds." *Id.* at 14.[3] For example, the defendant points out that under the Supreme Court's recent decision in *Bloomer* v. *Liberty Mut. Ins. Co., supra,* a longshoreman bears the expense of his own suit while the stevedore, which can recover its lien without cost, gets a free ride. If the stevedore, or its insurance company, sues on an assigned cause of action pursuant to section 33(b), it takes the chance of incurring its own litigation costs if the suit fails, and of recouping less than the full amount of its litigation expenses even if the suit succeeds. According to the defendant, "the stevedore could never obtain a fee arrangement with its own attorney on anything approaching the favorable terms accorded to it by the Supreme Court in *Bloomer.*" *Id.* at 17. Resource also contends that when the stevedore holds a lien on the recovery procured by the longshoreman, it can frustrate disposition of the case by refusing to waive or compromise its claims. When the stevedore, or its insurance company, brings an action under the Act, section 33(e) establishes the required distribution of proceeds. When the longshoreman himself sues, part of his recovery goes to reimbursing his employer and he retains the rest, minus counsel fees and litigation costs. In the defendant's view, "[p]ermitting ratification encourages the real party in interest [the insurance company] to gamble where, if it were potentially liable for fees and litigation costs it would, perhaps, not." *Id.* at 17. Resource thus contends

that ratification in LHWCA cases contravenes the "ethical considerations" underlying Rule 17(a) and is inconsistent with the Act's policy of discouraging needless litigation because it promotes actions that might not be "sufficiently savory for the insurance company or the employer to sponsor directly." *Id.* at 18.

Even assuming that some of defendant's allegations accurately describe the ratification arrangement, the Court rejects the bald assertion that this description demonstrates why ratification is inappropriate here. The ratification letter submitted by The State Insurance Fund ensures that any judgment or settlement resulting from Motta's suit will safeguard Resource against further litigation. The twin purposes of Rule 17(a) described above—protection of the defendant and effectuation of res judicata—would therefore be achieved by ratification. While this arrangement may be particularly advantageous to the insurance company, that is an issue to be resolved between Motta and The State Insurance Fund. Insofar as time, money, and resources are concerned, the cost of the company's alleged "no risk stake" is born [sic] by Motta, not the defendant. Resource, therefore, should not be able to invalidate an arrangement that is agreeable to these parties on the ground that undue benefits may inure to the insurance company. The benefits that the company may enjoy by virtue of this arrangement do not result in a corresponding loss to the defendant.

As stated in the Advisory Committee on the 1966 Amendment to Rule 17(a), "[i]n its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name." This purpose would be well served by allowing The State Insurance Fund to ratify Motta's suit. Under the 1959 amendment to the LHWCA, Pub. L. 86-171, 73 Stat. 391 (1959),

the longshoreman could have instituted his own action against the defendant within six months of accepting a compensation award. This amendment was enacted to resolve the preexisting dilemma of a longshoreman forced to choose between taking immediate compensation from his employer, the stevedore, or risking a third-party action against the shipowner. Congress recognized that:

> In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage.
>
> * * *
>
> The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation laws. The committee believe that in theory and practice this is sound approach to what has been a difficult problem.

S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959), reprinted in 1959 U.S. Code Cong. & Ad. News 2134, 2135. While Congress provided that the cause of action would accrue to the insurance company within six months of the acceptance of a compensation award, there is no evidence that the legislature would prohibit the insurance company from relinquishing its right to sue. The automatic assignment mechanism insured that the stevedore, or its insurance company, would have a remedy against the shipowner in

the event that the longshoreman chose not to sue. This assignment may be nullified in certain limited situations where a conflict of interest is established between the stevedore and the shipowner, *see, e.g. Czaplicki* v. *The Hoegh Silvercloud, supra; McClendon* v. *Charente S.S. Co.,* 348 F.2d 298 (5th Cir. 1965), or the insurance company's subrogation rights may be waived, *see Allen* v. *Texaco, Inc.,* 510 F.2d 977 (5th Cir. 1975).

In short, this assignment is not absolute. The Supreme Court has recognized that both the stevedore and the longshoreman have a common interest in the longshoreman's recovery against the shipowner. *Bloomer* v. *Liberty Mut. Ins. Co., supra,* 48 U.S.L.W. at 4212. The stevedore's interest, however, does not detract from the salutory result produced by ratification, the enhancement and increased availability of a longshoreman's right to sue under the Act notwithstanding the acceptance of a compensation award. Indeed, the advancement of both parties' interests in [sic] consistent with two primary purposes underlying LHWCA's more recent 1972 amendments: "to benefit longshoremen" and "to conserve stevedore expenses." *Bloomer* v. *Liberty Mut. Ins. Co., supra,* 48 U.S.L.W. at 4214 n.11. Rule 17(a) ratification allows the parties freedom to determine who shall prosecute a suit in which they both rightfully claim an interest. In the absence of any prejudice to the defendant, this result is consistent with the underlying rationale of the Rule and the policy concerns embodied in the Act.

A similar conclusion was reached by the court in *The Owen,* 43 F. Supp. 897 (E.D. Pa. 1942), a case arising long before the enactment of the LHWCA's 1959 or 1972 amendments. The longshoreman in that case sued the shipowner for injuries sustained while aboard the ship. The shipowner's principal defense was that the longshoreman could

not maintain the action "because he accepted three payments under the [LHWCA], Act of March 4, 1927 c. 509, 44 Stat. 1424, 33 U.S.C.A. § 901 et seq., and that under that Act such acceptance effects an assignment of the libellant's claim against a third party to his employer." *Id.* at 898. The court agreed with this statement of the facts. It noted, however, that the longshoreman had introduced into evidence an agreement executed by his employer, the stevedore, "reassigning to him the claim against any third party responsible for his injury, in consideration of his returning to it the compensation payments which it had made to him." *Id.* at 899. This agreement, the court held, was sufficient to allow the longshoreman to proceed directly against the shipowner notwithstanding the acceptance of compensation benefits. The court's reasoning, which is equally applicable here, was as follows:

> It therefore definitely appears that the employer in the case at bar has assented to the libellant's maintaining this action against a third party. In this respect this case differs from the cases relied upon by claimant, in all of which the employer either definitely opposed the claim of the employee against the third party, or there was no showing on the record of its position. This provision of the Longshoremen's and Harbor Workers' Compensation Act which transfers to the employer the rights of its employee against a third party upon the employee's acceptance of compensation is designed for the protection and benefit of the employer, not the third party wrongdoer. It entitles the employer who must pay compensation to the injured employee irrespective of fault, to enforce the employee's tort claim against any third party by whose fault the injury occurred. The third party tortfeasor was not the party sought to be protected by this provision of the Act and is

> given no ground thereunder to say which of two persons who may be entitled under the law to maintain an action against him may do so, except to the extent that he is entitled to protection against being exposed to action by both. Accordingly, where the employer objects to the action by the employee against the third party, or does not affirmatively assent thereto on the record, the third party may assert as a complete defense to an action by the employee the transfer of the employee's claim to the employer by operation of the Act, since otherwise he would still be subject to a like claim by the employer. Where, however, as in the case at bar, the employer, for whose protection Section 33 of the Act was adopted, has, by executing an assignment of the claim to the injured employee, disclaimed the right thus given to it by that section, the third party tortfeasor cannot rely upon the Act as a defense to a libel by the employee.

Id. at 899. *See also Magee* v. *McNany,* 10 F.R.D. 5 (W.D. Pa. 1950) (relying on *The Owen* in holding that an employer, to whom an employee's New York Workmen's Compensation Act rights have been assigned, can "authorize in writing counsel for the plaintiff to institute and prosecute the right to recover damages against the [third-party tortfeasor]").

II. *Defenses*

The final prong to defendant's attack against ratification of the longshoreman's suit is that it would eliminate a defense to the LHWCA action that would be available to company, the alleged "real and only party in interest." Dethe shipowner if the suit were brought by the insurance fendant's Memorandum at 21. In Resource's view, substitution, as opposed to ratification, would not produce such

an unfair result. The Court agrees that prejudice to the defendant is a factor to be considered in determining whether ratification should be permitted in a given case. And, as noted by some courts, an important function of the real party in interest rule is to enable the defendant to present all the defenses he has against the party entitled to pursue the claim. *See, e.g., Virginia Elec. & Power Corp.* v. *Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974); *Celanese Corp.* v. *John Clark Indus., Inc.*, 214 F.2d 551, 556 (5th Cir. 1954); *Pace* v. *General Elec. Co.*, 55 F.R.D. 215, 218 (W.D. Pa. 1972). Therefore, careful consideration must be given to defendant's claim that ratification "may well confer a substantive right on the insurance company that it would not have if it proceeded in its own name." Defendant's Memorandum at 12.

According to the defendant, the critical substantive difference between a longshoreman's suit and an insurance company's LHWCA suit is that the insurance company, but not the longshoreman, is subject to the shipowner's defense that the injuries were caused in part by the negligence of the employer, the stevedore. The defendant correctly cites *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), for the proposition that in an action brought by the longshoreman, a shipowner will be held liable for the total amount of the longshoreman's damages even though the stevedore's negligence contributed to his injuries. The defendant errs, however, in asserting that when an insurance company sues pursuant to section 33(b), it is subject to the defense, to the extent of its compensation expenses, that the stevedore's negligence contributed to the longshoreman's injuries. Resource's view of the law is apparently based on a misinterpretation of *Federal Marine Ter-*

minals, Inc. v. *Burnside Shipping Co.*, 394 U.S. 404 (1968), in which the Supreme Court held that the Act did not preclude a stevedore from pursuing an independent action against the shipowner based solely on the shipowner's breach of duty to the stevedore. The Court noted that its holding did not signal a departure from the *Halcyon* "no contribution" rule because the stevedore was not trying to impose responsibility on the shipowner for their joint negligence toward the longshoreman; the suit was not founded on the shipowner's "wrong" to the longshoreman "but on its independent wrong" to the stevedore. *Id.* at 418. In the defendant's view, since the stevedore's *"Burnside* cause of action" is subject to the *Halcyon* "no contribution" rule, a similar restriction must be imposed on an action brought under section 33(b). The defendant thus concludes that the stevedore's negligence must be a defense when it, or its insurance company, sues the shipowner because it would be inconsistent with the "no contribution" rule to allow the negligent stevedore to recover its compensation expenses from the shipowner. Defendant's Memorandum at 19-21.

Notwithstanding the policy concerns raised by the defendant, this Court disagrees with its reading of the law. *Burnside* should not be read so broadly as to govern this statutorily defined cause of action, based on the shipowner's negligence toward the *longshoreman,* which would normally be subject to the same rules as the longshoreman's own suit. In *Landon* v. *Lief Hoegh and Co.*, 521 F.2d 756, 760-61 (2d Cir. 1975), the Second Circuit observed that *Burnside* involved an atypical situation and it was questionable whether a *"Burnside* type of action" continues to exist in light of the 1972 amendment to the Act which provided that it was "exclusive of all other remedies against the vessel." 33 U.S.C. § 905. More importantly, in discussing the inter-

play between *Burnside, Halcyon* and *Pope & Talbot,* the court of appeals stated:

> It is true, of course, that section 33(b) does not speak in the language of "lien" but of "an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person" . . . , but under the law, the compensation payment recoupment may not be defeated on the theory of concurrent negligence, in any event.

Id. at 760 n. 3.

Finally, defendant's view that the insurance company's suit is subject to a defense based on the stevedore's contributory negligence is contrary to the Supreme Court's recent decision in *Edmonds* v. *Compagnie Gen. Transatlantique,* 443 U.S. 256 (1979). The *Edmonds* Court held that the 1972 LHWCA amendments were not intended to establish a proportionate-fault standard to replace the judicially created admiralty rule that the shipowner can be liable for all the longshoreman's damages that are not attributable to his own negligence. The Court thus rejected the conclusion reached by an en banc panel of the Fourth Circuit that the traditional admiralty rule had been changed to make the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. *Id.* at 258-59. The *Edmonds* Court described how such a rule could create "many circumstances" in which the longshoreman could not recover in any way the full amount of damages determined in his suit against the vessel. *Id.* at 269. For example, if his damages are at least twice the benefits paid under the Act and the ship is less than 50% at fault, the total of his statutory benefits plus the reduced proportionate-fault recovery from the ship would not amount to his total damages. Furthermore, the Court continued,

the impact of the proportionate-fault rule on the longshoreman does not stop there. Under § 933(b), an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And a corresponding judicially created lien in the employer's favor operates where the longshoreman himself sues. In the past, this lien has been for the benefits paid up to the amount of the recovery. And under § 933(c), which Congress left intact in 1972, where the stevedore-employer sues the vessel as statutory assignee it may retain from any recovery an amount equal in general to the expenses of the suit, the costs of medical services and supplies it provided the employee, all compensation benefits paid, the present value of benefits to be paid, plus one-fifth of whatever might remain. Under the Court of Appeals' proportionate-fault system, the longshoreman would get very little, if any, of the diminished recovery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore might recoup all the compensation benefits it had paid.

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect. Further, the 1972 Amendments make quite clear that "the employer shall not be liable to the vessel for such damages *directly or indirectly*," 33 U.S.C. § 905(b) (emphasis supplied), and that with the disappearance of the ship's contribution and indemnity right against the stevedore the latter should no longer have to appear routinely in suits between longshoreman and shipowner.

Id. at 269-71 (footnotes omitted).

This passage demonstrates that the Supreme Court has rejected the view that an insurance company's section 33(b) suit is subject to the defense that the shipowner's liability should be less than the total amount of damages because the stevedore's negligence contributed to the longshoreman's injuries. In neither an insurance company's nor a longshoreman's LHWCA action can the shipowner reduce its liability by virtue of the concurrent negligence of the stevedore. The defendant's purported distinction between these two suits appears, therefore, to be nonexistent. Accordingly, the Court rejects Resource's argument that ratification is inappropriate here because it would eliminate a defense that would otherwise have been available to it.

Conclusion

Defendant Resource's motion to dismiss the complaint on the ground that Motta is not the real party in interest is denied. The Court concludes that ratification of a longshoreman's LHWCA action by the insurance company to which the claim has been assigned is consistent with the policies underlying Rule 17(a) and the Act. The State Insurance Fund's ratification letter, therefore, has "the same effect as if the action has been commenced in the name of the real party in interest." Fed. R. Civ. P. 17(a).

So ordered.

Dated: New York, New York
October 22, 1980

CHARLES H. TENNEY
U.S.D.J.

76 Civ. 5217 (CHT)

RONALD MOTTA,

Plaintiff,

—against—

RESOURCE SHIPPING & ENTERPRISES CO.,

Defendant.

FOOTNOTES

1. Federal Rule of Civil Procedure ("Rule") 17(a) provides:

> Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

2. In *Czaplicki* v. *The Hoegh Silvercloud, supra,* the Supreme Court held that a statutory assignment effected by section 33(b) can be invalidated if a conflict of interest exists between the longshoreman and his employer. When "the inaction of the assignee operates to defeat the employee's interest in any possible recovery," the Court stated that "the statute should be construed to allow [the longshoreman] to enforce, in his own name, the rights of action that were his originally." 351 U.S. at 531. Since *Czaplicki* was decided, some courts have relied on the conflict-of-interest doctrine to invalidate assignments and allow longshoremen to institute their own suits against shipowners after the six-month period has expired. *See, e.g., Potomac Elec. Power Co.* v. *Wynn,* 343 F.2d 295 (D.C. Cir. 1965); *Johnson* v. *Sword Line, Inc.,* 257 F.2d 541 (3d Cir. 1958).

Plaintiff's first response to defendant's motion to dismiss was that "[t]he motion must be denied as defendant did not sustain its burden of proof to show that there is no conflict of interest between the

plaintiff and the stevedore." Affidavit of Morris Cizner, sworn to August 17, 1979, ("Cizner Aff.") at 1. The Court rejects this argument. The weight of authority in this Circuit places the burden of proof on the *plaintiff* to submit evidence demonstrating a conflict of interest sufficient to nullify this statutory assignment. The court of appeals recently reaffirmed this view in *Rodriguez* v. *Compass Shipping Co.*, 617 F.2d 955 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 79-1977). Viewing *Czaplicki* "as limited to its unique facts," *id.* at 961, the Second Circuit disagreed with the contention that the employer's mere failure to sue the shipowner demonstrated that the assignment should be invalidated on public policy grounds.

Motta has presented no evidence of a conflict of interest in the case at bar. Instead, he rests solely on his assertion that the stevedore's failure to bring an action against the shipowner is "ipso facto" sufficient "to take the case out of the statute." Cizner Aff. at 2. This statement of the law is clearly erroneous and Motta's conflict-of-interest defense is without merit.

3. Pursuant to section 33(e):

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commission or Board);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the reprerepresentative; and
>
> (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, OVE SKOU, R. A.

FRANCIS X. BYRN
Attorney for Respondent
One State Street Plaza
New York, New York 10004
(212) 344-6800

JOHN M. TORIELLO
Of Counsel

Questions Presented for Review

1. Has the particular conflict-of-interest exception to section 33(b) of the Longshoremen's and Harborworkers' Compensation Act, as announced by this Court in *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956), been removed by subsequent Congressional amendments?

2. Is the conflict-of-interest exception to section 33(b), if any, limited to demonstrated conflicts of interest?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Authorities iii

Statement of the Case 1

Summary of Argument 4

ARGUMENT 6

POINT I—

The LHWCA, as Originally Enacted and Subsequently Amended in 1938, 1959 and 1972, Provides for the Assignment of a Third Party Cause of Action to the Employer 6

POINT II—

In an Exception to Section 33(b) Exists, That Exception Is Limited to the Exception Stated by This Court in *Czaplicki* v. *Hoegh Silvercloud* and Petitioner Has Failed to Prove Facts Bringing the Claim Within the Exception 29

CONCLUSION 34

Table of Authorities

Cases cited: PAGE

American Stevedores, Inc. v. *Porello,* 330 U.S. 446 (1947) 19, 30

Bloomer v. *Liberty Mutual Ins. Co.,* 445 U.S. 74 (1980) 24, 26

Caldwell v. *Ogden Sea Transport, Inc.,* 618 F.2d 1037 (4th Cir. 1980) 20

Czaplicki v. *Hoegh Silvercloud,* 351 U.S. 525 (1956) 4, 5, 13, 15, 16, 19, 26, 29, 30

Director, Office of Workers' Compensation Programs v. *Rasmussen,* 440 U.S. 29 (1979) 14, 29

Edmonds v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979) 20, 22, 24, 25, 26, 28

Hernandez v. *Costa Armatori, S.p.A.,* 467 F. Supp. 1064 (E.D.N.Y. 1179), *aff'd. mem.,* 622 F.2d 573 (2d Cir. 1980) 31

Johnson v. *Sioux City & New Orleans Barge Lines, Inc.,* 629 F.2d 1244 (7th Cir. 1980) 25, 27

Johnson v. *Sword Line, Inc.,* 257 F.2d 541 (3rd Cir. 1958) 17, 26

Joyner v. *F & B Enterprises, Inc.,* 448 F.2d 1185 (D.C. Cir. 1971) 23

McClendon v. *Charente S.S. Co.,* 348 F.2d 298 (5th Cir. 1965) 19, 26, 28

Moore v. *Hechinger,* 127 F.2d 746 (D.C. Cir. 1942) 23

Northeast Marine Terminal Co. v. *Caputo,* 432 U.S. 249 (1977) 24

PAGE

PEPCO v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) 18, 28, 29
Pillsbury v. *United Engineering Co.*, 342 U.S. 197 (1952) 28, 29

Rodriguez v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980) 20
Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 4, 10, 27

Sabol v. *Merritt Chapman & Scott Corp.*, 241 F.2d 765 (2d Cir. 1957) 16, 24
Seas Shipping Co. v. *Sieracki*, 328 U.S. 25 (1946) 27

Toomey v. *Waterman S.S. Corp.*, 123 F.2d 718 (2d Cir. 1941) 24

Valentino v. *Rickmers Rederei, G.M.B.H.*, 552 F.2d 466 (2d Cir. 1977) 32

Westchester Rockland Newspapers, Inc. v. *Kimball*, 50 N.Y.2d 575, 430 N.Y. Sup.2d 574 (1980) 33
White v. *United States*, 507 F.2d 1101 (5th Cir. 1975) .. 24

Statutes and Rules:

73 Stat. 391 7

44 Stat. 1429, 1440 6

52 Stat. 1168 6

33 U.S.C. §933(b) 7, 15

33 U.S.C. §905(b) 15

F. R. Civ. P. 19(a) 21

F. R. Civ. P. 56 3

PAGE

Other Authorities:

H.R. Rep. No. 1945, 75th Cong., 3d Sess. 7, 17

H.R. Rep. No. 229, 86th Cong., 1st Sess. 8, 9, 18

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 27

S. Rep. No. 428, 86th Cong., 1st Sess. 14, 17, 18

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 25

105 Cong. Rec. 5560-5562 (1959) 8

Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special Subcommittee on Education and Labor of the House of Representatives, 84th Cong., 2d Sess. (May 23, 24 and June 11, 1956) 10, 11, 12, 13, 17, 25, 31

Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery,* 52 St. John's L. Rev. 395 (1978) 7

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FREDERICO RODRIGUEZ,

Petitioner,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

—against—

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, OVE SKOU, R. A.

Statement of the Case

Petitioner Barulec commenced this action by the filing of a complaint in the United States District Court for the

Southern District of New York on or about February 22, 1978. (91a).* Petitioner sought to recover damages for injuries allegedly sustained on January 6, 1975 while working in the employ of Universal Maritime Service Corp. and assisting in the discharge of respondent's vessel.

Petitioner's employer filed a first report of accident pursuant to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) for the injuries allegedly sustained on January 6, 1975 (109a-112a). Thereafter, compensation was paid by the employer's insurer, Midland Insurance Co., without an award from January 10, 1975 until March 14, 1975 (113a-116a). On March 25, 1975, a claim for additional compensation was made by the petitioner's attorneys and a conference in the matter was requested at that time as well as in later letters of August 18, 1975 and December 22, 1975 (117a-119a).

As noted in the request dated December 22, 1975, petitioner's attorneys sought to have "the case scheduled for an early conference for final disposition" (119a). A conference was held on February 11, 1976 before the United States Department of Labor, Office of Worker's Compensation Programs at which time a settlement of the claim was reached (120a-124a). The agreement was memorialized in a Department of Labor Memorandum of Informal Conference dated February 11, 1976, wherein it was stated that compensation was to be paid in the amount of $2,282.01 for temporary total disability for 12-3/7th weeks and in the amount of $3,172.78 for a 6% permanent partial disability of the left leg. Payment of compensation in accordance with this memorandum was made by the compensation insurance company and notice of this payment was

---

* References followed by "a" refer to pages in the Joint Appendix.

given to the United States Department of Labor on February 13, 1976 (125a-127a).

Petitioner does not dispute that he accepted compensation under the Memorandum dated February 11, 1976 and did not commence suit in this matter until February 22, 1978, more than two years after the date of the award.

Respondent moved, pursuant to Federal Rules of Civil Procedure 56, for summary judgment dismissing the complaint of the plaintiff by Notice of Motion dated December 8, 1978 (93a-127a). Petitioner's opposition to the motion consisted solely of an attorney's hearsay affidavit (128a-130a). In a decision dated May 31, 1979, the district court ruled that petitioner had accepted compensation under an award in a compensation order and had not commenced suit within six months of the award (Supp. App. to Pet. for Cert. 1g-17g). The court also held, however, that there is a conflict-of-interest exception to section 33(b) of the LHWCA which, as a result of the 1972 Amendments to the LHWCA, must be proven rather than presumed. Holding that petitioner bears the burden of proving facts sufficient to bring himself within this exception to the statutory rule, the court granted petitioner 45 days within which to submit competent evidence establishing the existence of a conflict of interest. The motion for summary judgment was denied, therefore, without prejudice to renewal after 45 days.

By Notice of Motion dated July 18, 1979, respondent renewed its motion for summary judgment (142a-148a). Petitioner presented no evidence of a conflict of interest (149a-161a). The Court, by endorsement dated August 8, 1979, granted the motion for summary judgment noting petitioner's failure to submit any evidence tending to show that a conflict of interest existed (162a-163a).

On appeal, the Second Circuit affirmed the judgment of the district court for the reasons stated in *Rodriguez* v.

Compass Shipping Co., Ltd. (Supp. App. to Pet. for Cert. 1c). In *Rodriguez,* the Court of Appeals held that the conflict-of-interest exception announced in *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956), is limited to the unique facts which existed in *Czaplicki.* Those facts were not duplicated either here or in the *Rodriguez* decision.

This Court has granted certiorari to review the decision of the Second Circuit limited to questions concerning the scope and continued viability of any conflict-of-interest exception to section 33(b) of the LHWCA.*

Summary of Argument

Respondent contends that there is no conflict-of-interest exception to the assignment of third party causes of action under section 33(b) of the LHWCA. Prior to 1959, this Court found such an exception in *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956), because the assignee was also the insurer of one of the defendants in the third party lawsuit. Consequently, the claim was held by the one party most likely to suffer if the cause of action was successfully enforced. A similar conflict was presented in nearly every longshoreman's third party action as a result of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

Congress was made aware of the conflict-of-interest problem in 1956, resulting in the drafting of an amendment

---

*** The Amicus brief submitted in support of petitioners ignores the order of this Court which granted certiorari. Thus, in Point 3 of its brief, Amicus seeks to quarrel with the district court's and Court of Appeals' conclusion that petitioners received compensation under an award in a compensation order. Since this Court has declined review of this question, Respondent will not reply to the argument of Amicus counsel.**

to section 33(b) which was enacted in 1959. This amendment gave the employee six months after acceptance of compensation under an award within which to bring suit. It also gave the employer a one-fifth share in the recovery as an incentive to prosecute assigned meritorious third party claims. Congress did not abrogate the assignment, but chose to assign the claim after a reasonable period of inaction by the employee.

Respondent alternatively contends that if a conflict-of-interest exception exists, the exception can be no broader than the limited exception found in *Czaplicki*. Petitioner's contention that the cause of action revests when the assignee, for whatever reason, does not commence suit must be rejected. Such a rule would nullify the intended effect of section 33(b). It would replace certainty as to the proper party to bring suit with uncertainty. Moreover, it would remove the independent assessment of these claims by insurers or employers. Such assessment would eliminate those cases which a more objective eye would view as not meritorious or of insufficient value to warrant a lawsuit.

Petitioner has failed to present any competent evidence of a conflict of interest. Without such evidence, the granting of defendant's motion for summary judgment was correct and should be affirmed.

ARGUMENT

POINT I

The LHWCA, as Originally Enacted and Subsequently Amended in 1938, 1959 and 1972, Provides for the Assignment of a Third Party Cause of Action to the Employer.

Legislative History

From its enactment, the LHWCA provided that third party causes of action held by persons entitled to compensation would be assigned to the employer so long as payment of compensation was made. In its original form, section 33(b) automatically assigned all third party causes of action to the employer upon acceptance of any compensation by the employee, 44 Stat. 1429, 1440 (1927). In 1938, the statute was amended to postpone the assignment of the cause of action until the employee had accepted compensation "under an award in a compensation order." 52 Stat. 1168 (1938). The amendment was intended to forestall the assignment for a reasonable time to allow consideration by the employee. The amendment was explained in the House Committee report as follows:

> "Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the Deputy Commissioner, giving opportunity to the injured person . . . *to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party,* or a refusal of compensation

> so as to pursue the remedy against the third party alleged to be liable for the injury." H.R. Rep. No. 1945, 75 Cong., 3d Sess. at 9. (emphasis added).

The assignment was still envisioned by Congress as part of the *quid pro quo* for the employee's right to compensation. Thus, if he declined compensation he was entitled to pursue the third party claim. Acceptance of compensation under an award, however, resulted in the relinquishment of his rights to bring a third party action. *See* Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employer's Tort Recovery,* 52 St. John's L. Rev. 395, 397 n.8 (1978) (discussing the New York State Workmen's Compensation statute upon which the LHWCA was modeled). It cannot be clearer from the House Report that Congress did not envision any exceptions to the assignment once compensation had been accepted under an award in a compensation order.

This section, as enacted in 1959, read as follows:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." * 73 Stat. 391 (1959).

As in its prior forms, the statute is clear and unambiguous. The assignment gives the employer "all right of the person entitled to compensation to recover damages against

---

* In 1972, the section was amended to add a reference to the Benefits Review Board which was created in the course of the 1972 amendments. 33 U.S.C. §933(b) (1976). This technical amendment did not affect the issues presented on this appeal.

such third person. . . ." This assignment is conditioned solely upon the receipt of compensation under an award in a compensation order and the failure by the employee to commence suit against the third person within six months after the award.

The legislative history of the 1959 Amendment underscores the careful consideration given by Congress to various problems which had arisen as a result of an interplay between the 1938 language and subsequent judicial developments. The amendment originated in the 84th Congress and extensive hearings were held by a subcommittee in 1956. During the 85th Congress the legislation was reported favorably by a House Committee and passed by the House. Because of an amendment on an entirely different subject in the Senate, the House did not act on the bill as passed by the Senate. In the 86th Congress, a bill which was identical to the bill which had been previously passed by the House was re-introduced, reported favorably by a Committee and passed by the House on April 8, 1959. H.R. Rep. No. 229, 86th Cong., 1st Sess. (hereinafter H.R. Rep. No. 229); 105 Cong. Rec. 5560-5562 (1959).

The bill originally passed by the House was longer and more convoluted than the present form of the statute. The Senate shortened the House bill by amendment and the Senate version was subsequently adopted by the House. The original House bill, nonetheless, had the same purpose as the ultimate version of the statute, although it incorporated additional safeguards for the employee as well as various technical provisions which were deleted by the Senate amendment. The original House bill provided for the six month period within which to commence suit but also required the employer or carrier to give notice to the employee at least thirty days prior to the expiration of the six month period that failure of the employee to com-

mence suit would result in the assignment. Failure to give notice extended the six month period until thirty days after the employer or insurer gave notice.

The House Report and the extensive 1956 hearings demonstrate that Congress was acutely aware of the conflict-of-interest problem and had drawn this legislation to resolve that problem. The House Report states "[d]evelopments under the act which concerned the Subcommittee on Safety and Compensation have been . . . the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest. . . ." H.R. Rep. No. 229 at 3. The report also summarizes the law as perceived, and relied upon, by Congress in 1959:

> "Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim."

The report summarizes the amended subsection (b) in pertinent part as follows:

> "Subsection (b) provides that if, in the situation referred to above, the employee or his survivors or legal representatives do not commence action against the third person within the time limit set forth above [six months], the failure will operate to assign the cause of action to the employer or his insurance carrier. . . ." H.R. Rep. No. 229 at 3.

The hearings on this bill were held in May and June, 1956. *Hearings on Bills relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special*

Subcommittee of the Committee on Education and Labor of the House of Representatives, 84th Cong., 2nd Sess. (May 23, 24 and June 11, 1956) (hereinafter Hearings, 84th Cong.). During these hearings, the problem of conflict of interest between the assignee and employer was the subject of numerous lengthy discussions. For example, on May 23, 1956, the first statement made to the subcommittee was by Congressman Zelenko, one of the authors of H.R. 5357 which had incorporated the basic provisions relating to sections 33(a) and (b) in the bill eventually passed in the House on April 8, 1959. Congressman Zelenko began his testimony by pointing out and inserting in the subcommittee's record the decision *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). Hearings, 84th Cong. at 1-11. Congressman Zelenko then explained the genesis of his proposal as well as its intended effect:

> "It has been generally acknowledged that the Longshoremen and Harbor Workers' Compensation Act is modeled substantially after the New York State Workers Compensation Act. Using the latter statute I have modeled H.R. 5357 from one of its relevant sections which has functioned in a manner satisfactory to all parties concerned.
>
> I believe that it is fair in all respects both to the employer and to the employee.
>
> The employee is protected in his claim against the third party at all times whether he accepts compensation or not. An assignment of his rights to the employer comes into being only when he fails to avail himself of third-party remedy. The employer is also protected. He may acquire the right of assignment and then proceed to recoup his loss. The elimination of all rights of the employer to an assignment in the instant situation would be grossly unfair. *On the other*

> *hand, H.R. 5357 avoids and eliminates the circumstances indicated by Judge Black* [referring to the dissenting opinion in *Ryan*, 350 U.S. at 135, 144-46] *where to the detriment of the employee, the employer under the present section and by reason of the Ryan decision may decide not to proceed with the third-party action.*
>
> H.R. 5357 provides an added incentive to the employer when he once acquires the right of assignment, to recover as much as possible from the third party where the longshoreman himself has filed [sic] to proceed. It provides that in the event of an action under an assignment to the employer, the employee receives only two-thirds of any excess of the amount paid in compensation. This provision differs from the one now in existence where, if any sum is recovered by the employer over the amount paid or due in compensation it is all turned over to the employee. The employer should have some inducement to commence and prosecute the litigation. *Furthermore, in a situation similar to the Ryan case, where the employer might be obliged to pay the total cost of the recovery in a third-party action, his loss would be mitigated. He would not be burdened with the entire recovery, but only with two-thirds of it.*" Hearings, 84th Cong. at 12-13 (emphasis added).

Congressman Zelenko continued his explanation under questioning by the members of the subcommittee:

> MR. MCDOWELL. Is that the reason for the 6-month provision?
>
> MR. ZELENKO. I think that there should be some length of time in which the parties can learn their rights. Most of the time the longshoreman finds his own lawyer, but I have seen and heard of cases where

many times this man does not know his rights, and sometimes through his employer, he finds out that he has certain rights because the employer is interested in getting this money back. If I had urged 10119, it would have been grossly unfair to the employer. In other words, it would be practically left up to the longshoreman, and if he did not go ahead, the employer would lose any possible chance of getting back his compensation money.

The Ryan situation does not occur at all times, that is, where the company both loads and unloads a vessel. It happens frequently but not too often. *However, this way the right of assignment is acquired by law by the employer when the employee, for whatever reason, does not assert his rights.*

I hope I have answered your questions by trying to show what the situation in the Ryan case would be. That is the factual and the legal situation, and assuming we had the Ryan case pending at this time, the employer would lose any interest in proceeding with it, and the longshoreman would suffer. That is what Judge Black was talking about. Under H.R. 5357 both parties go in there and if the longshoreman chooses to go ahead, he does so; and if he does not go ahead, the employer starts a lawsuit in his own behalf only after the longshoreman has had the opportunity to do so, and he does not want to avail himself of it, then they give the employer this right of assignment automatically, so he gets the same measure of protection." Hearings, 84th Cong. at 14-15 (emphasis added).

This same provision was repeatedly discussed in the course of the subsequent hearings. *E.g.*, Hearings, 84th Cong. at 19-20, 43-45 (Congressman Roosevelt raises the

possibility that the employer for business reasons might compromise the claim solely for the lien amount and he suggests that the employee might be better off holding the claim himself), 50-51, 59 (facts of *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956) presented), 60-62 (Circuit Court opinion in *Czaplicki* cited, facts reviewed and certiorari by Supreme Court noted), 83-84, 95-96, 99, 102, 105-07, 110, 116-18, 125-27, 132.

In the Senate, the amended bill deleted the 30-day notice to the employee making the assignment solely contingent upon the receipt of compensation under an award in a compensation order, and the employee's failure to commence suit within six months of the compensation award. The Senate Report explained the purpose and effect of the bill as follows:

> "The bill as amended by the committee would revise section 33 of the Act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the Act. . . . The committee believe that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and rights of all who are involved.
>
> . . . In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, . . . and all benefits and compensation have been deducted. Thus, by giving the employer a reasonable (one-fifth) share in the net recovery and [sic] incentive is pro-

> vided not to compromise a suit only for the amount of compensation but to protect the interests of the employee as much as possible." S. Rep. No. 428, 86th Cong., 1st Sess. at 2 (1959).

It is eminently clear from the language of the statute, the legislative history, the legislative reports and the legislative hearings, that Congress considered various alternatives, was aware of the conflict-of interest-problem and chose to enforce an absolute assignment of the third party claim following a reasonable period of inaction by the employee. This choice was made after extensive hearings and based on committee reports which provided opportunity for the presentation of the views of all concerned parties and which specifically found that "the equities and rights of all who are involved" were given due recognition. The conclusion is therefore mandated that the Congress intentionally omitted any provision for the reassignment of this cause of action to an employee, any provision for the concurrent holding of this cause of action by both the employee and employer, and any provision permitting the avoidance of the assignment because of a conflict of interest. As this Court has recently stated in construing another section of the LHWCA,

> "[O]ur examination of the language and legislative history . . . convinces us that the omission was intentional. Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.'" *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, 440 U.S. 29, 46-47 (1979).

The subsequent legislative developments, if anything, support this conclusion. Thus, in 1972, Congress did not

amend section 33 of the LHWCA but reaffirmed the provisions of section 33 by referring to it in section 5 of the LHWCA. This section, in pertinent part, reads as follows:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, . . . may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act. . . ." 33 U.S.C. § 905(b).

In the intervening period between 1959 and 1972, this Court did not announce any decisions which modified the policy determinations reached by Congress in 1959.

Judicial Developments

Prior to the 1959 Amendment, this Court decided *Czaplicki* v. *Hoegh Silvercloud,* 351 U.S. 525 (1956). The holding was summarized by the Court as follows:

> "Since an action by Travelers would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. *In this circumstance,* we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally." 351 U.S. at 531 (emphasis added).

Travelers was the workmen's compensation insurer for Northern Dock Company, the employer of Czaplicki, as well as the insurer of Hamilton Marine Contracting Company which, along with the vessel owner and operator, had been sued by Czaplicki in a third party action brought under the LHWCA. By reason of the statutory assignment provided in the LHWCA, 33 U.S.C. § 933(b), Travelers was also the proper statutory party to bring suit on behalf of Czaplicki. Because Travelers insured Hamilton Marine

Contracting Company, one of the third parties subject to suit by the plaintiff under traditional negligence principles, this Court concluded that Czaplicki's rights of action "were held by the party most likely to suffer were the rights of action to be successfully enforced." 351 U.S. at 530. This Court held that the section 33(b) assignment would be ineffective only where the statutory assignee would, by pressing the assignor's claim, subject itself to suit. As the *Czaplicki* Court explained:

> "Czaplicki can bring this suit not because there has been no assignment, but *because in the peculiar facts here* there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action." 351 U.S. at 532-33 (emphasis added).

Shortly after the decision in *Czaplicki,* the Second Circuit had occasion to review the effect of section 33(b) and *Czaplicki. Sabol* v. *Merritt Chapman & Scott Corp.,* 241 F.2d 765 (2d Cir. 1957), rejected the assertion that the assignment provision should be interpreted to permit ownership of the third party action by both the employee and employer. The court observed: "Such a rule would leave third parties subject to suit by both the employer and the employee, the very situation the Congress was attempting to prevent by the assignment section of the statute." 241 F.2d at 767. The court concluded with its interpretation of *Czaplicki,* stating:

> "The holding in Czaplicki . . . , was carefully limited by the court to the peculiar situation there presented. That case has no application here." 241 F.2d at 768.

In *Sabol,* the employee of a stevedore had brought suit against the owner of a scow upon which the employee was allegedly injured while engaged in unloading cargo. The

barge owner asserted as a defense that the employee no longer owned the cause of action because he had accepted payments under a compensation award. The district judge dismissed the libel and this dismissal was upheld on appeal by the Second Circuit.

A year after *Sabol* was decided, the Third Circuit rendered its opinion in *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958). There, the court invoked *Czaplicki* to permit an employee to prosecute a third party action because the employer was subject to an indemnity suit under *Ryan*. The court nonetheless agreed that should the insurance carrier or employer have adequate grounds for concluding that the third party action was not meritorious, then its refusal to commence suit would be proper and the employee should not be permitted to pursue the claim. Notably, the court also refused to permit prosecution of the claim unless it was shown that the employer had a conflict of interest, such as the possibility of an indemnity lawsuit by the third party.

As noted earlier, the reasoning of the Third Circuit was presented to the Congress during the hearings held in 1956. Moreover, the facts of *Czaplicki*, although not the actual decision of this Court, was also placed before the Congress by Czaplicki's own attorneys who testified during the hearings. Hearings, 84th Cong. at 59, 60-62. Both the House and Senate Reports summarized the existing law upon which Congress acted in 1959. Thus, at page 3 of the House Report, it is stated: "Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim." *Accord*, S. Rep. No. 428, at 1. Congress evidently viewed *Czaplicki* as did the Second Circuit, *i.e.*, a decision care-

fully limited to its peculiar facts involving an insurer which both held the assignment and represented one of the primary defendants in the third party lawsuit. Thus, as further stated by the House Report, one of the developments under the LHWCA which particularly concerned the committee was "the automatic assignment of a third-party cause of action to the employer and the refusal by the employer to pursue the third-party claim because of a conflict of interest." H.R. Rep. No. 229, at 3.

The amendment which was eventually passed by Congress was drawn in response to this situation and represents the Congressional choice as to the appropriate remedy. The intended operation of this law was spelled out in the Senate Report. S. Rep. No. 428 at 2, quoted *supra.*

Despite the clear presentation of the problem to Congress and the Congressional response by way of an amendment to the LHWCA, two Circuit Courts which were subsequently confronted with the question of the existence of a conflict-of-interest exception to section 33(b) of the Act, chose to ignore the Congressional determination. In *PEPCO* v. *Wynn,* 343 F.2d 295 (D.C. Cir. 1965), the Court viewed the 1959 Amendments as merely supplementing, rather than supplanting, *Czaplicki.* In a *per curiam* opinion of two of the three Circuit Judges, the court held that the employee may prosecute a third party suit when it is evident that the employer-assignee, for whatever reason, does not intend to bring suit. 343 F.2d at 298. The *per curiam* opinion acknowledges that the case did not present the clear conflict of interest that was presented in *Czaplicki* and concedes that it is plausible that the employer "sincerely believed that PEPCO was not liable." 343 F.2d at 297. To avoid an expansion of judicial proceedings by requiring a hearing on the employer's reason for

refusal to sue, the Court interpreted the 1959 Amendments to permit a third party suit by the employee whenever the employer refused to sue. Judge Wright concurred in the result because he found *Czaplicki* to be applicable on its facts, based on the continued liability of the employer in the District of Columbia under *Ryan*. 343 F.2d at 300.

The Fifth Circuit aired its views in *McClendon* v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965). There, a longshoreman sued the owner and operator of a vessel more than six months after the receipt of compensation under an award. The defendants impleaded the longshoreman's employer seeking indemnity based on the stevedore's implied warranty of workmanlike service. The court found that the purpose of the 1959 Amendment was simply to eliminate the election requirement* and to allow an employee to both sue a third party and collect compensation. There being no direct reference to *Czaplicki* in the committee reports, the court refused to find that that decision had been legislatively overruled. Nonetheless, it was also recognized that the plain language of the statute "admits of no exceptions and precludes the construction which we here adopt." 348 F.2d at 302. The court's answer was that the statutory language prior to 1959 was as unequivocal and the Supreme Court was nonetheless able to fashion an exception in *Czaplicki*. Referring to *PEPCO*, the Court refused to endorse a similar broad holding which would have eliminated the requirement that a conflict of interest be demonstrated. 348 F.2d at 303. Thus, the Court ruled that it must be shown in each particular case that a conflict of interest actually exists.

---

* This distinction is unconvincing for as this Court noted in *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 455 (1947), "election and assignment are two sides of the same coin." *Accord*, *Czaplicki* v. *Hoegh Silvercloud*, 351 U.S. at 532.

In 1972, Congress enacted extensive amendments to the LHWCA, including section 5(b), 33 U.S.C. § 905(b). This section, among other things, eliminates an employer's liability to a vessel under the principles of *Ryan*. Moreover, as was noted in *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 261 n. 9 (1979), Congress increased the compensation benefits, making "a determined effort to narrow the gap between the harm suffered and the benefits payable." Following these amendments, the Second Circuit, in the case here under review and the Fourth Circuit in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), analyzed the current viability of a conflict-of-interest exception to section 33(b) of the LHWCA.

In *Rodriguez* v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), the circuit court rejected the notion that an employer's desire not to antagonize its customer by bringing a lawsuit is a sufficient conflict of interest to void the assignment provided in section 33(b). As the Court noted, the employee had six months, following the award, within which to bring his own suit against the vessel without any interference or control by the employer. Instead, the Second Circuit followed the interpretation it had reached more than twenty years earlier in *Sabol*, limiting *Czaplicki* to its unique facts. The Court found that this result was impelled both because the 1959 Amendments removed the automatic assignment which had produced such a harsh result in *Czaplicki* and because section 5(b) of the LHWCA eliminates the employer's liability under *Ryan*. In short, the Court refused to rewrite an act of Congress or to overrule a decision of this Court.

In contrast to the Second Circuit, the Fourth Circuit, in *Caldwell*, extrapolating from *Czaplicki* found that regardless of the statutory assignment, the third-party claim

"revested" in the employee when, for whatever reason, the statutory assignee declined to prosecute a third-party claim. This result, which is found in Part III of the Opinion, is all the more surprising because in Part II of the Opinion the Court recognized *PEPCO* as adopting such a rule and rejected it because of its distinct similarity to the proposition that the right of action could be concurrently held by both the employee and employer. 618 F.2d at 1042.

Nonetheless, building on this foundation allegedly supported by the decision in *Czaplicki,* the Fourth Circuit formulated a procedure for the reassignment of the personal injury claim from the statutory assignee to the longshoreman. This procedure includes informal correspondence between the longshoreman and the statutory assignee, as well as a perversion of F.R.Civ.P. 19(a) to allow the employee to commence an action which he does not possess, joining the assignee as an involuntary plaintiff. Despite its statutorily granted all-encompassing control of the litigation, the statutory assignee is then forced to participate in an action which it presumably does not wish to prosecute.* The repeal of section 33(b) of the LHWCA next results in the repeal of section 33(e), the statutorily mandated distribution scheme for actions brought pursuant to section 33(b). 618 F.2d at 1048.

Under *Caldwell,* the employer and its insurer are forced to participate in a lawsuit which they do not wish to bring. The third party is relegated to a constant state of uncertainty regarding the proper party with whom it should be dealing either in settlement negotiations or litigation. The employee, in turn, is encouraged to bring a lawsuit, but is not encouraged to bring the lawsuit within the time period

---

* The Fourth Circuit candidly conceded that the statutory assignee's inaction might be prompted by its own good-faith belief that the claim is not meritorious. 618 F.2d at 1045.

adopted by Congress. All of this is necessary because, as the Fourth Circuit itself noted, the employee failed, whether by design or inadvertence, to prosecute his action during the period of time, *viz.* six months plus the lapse of time between the injury and an award, when the claim was exclusively his to bring. 618 F.2d at 1045.

Interpretation of Section 33(b)

Petitioner urges this Court to apply the reasoning in *Edmonds* to the issue presented on this appeal. In petitioner's view, *PEPCO* was the law of the land, similar to the judicial rule of joint and several liability in maritime cases amongst concurrent tortfeasors discussed in *Edmonds,* and that Congress, by not substantively amending section 33 of the Act in 1972, relied on *PEPCO.* This supposed reliance then casts *PEPCO,* a two-judge *per curiam* opinion, as the supreme law of the land. It is respectfully submitted that *Edmonds,* though applicable in its reasoning to this appeal, is not applicable for the reasons stated by the petitioner, nor does it support the conclusions reached by the petitioner.

In *Edmonds,* the majority demonstrated, and the dissent was willing to assume, that the rule sought to be changed was the traditional admiralty rule in 1972. The Court supported this conclusion by citation to three Supreme Court cases and by noting that the rule also accorded with the common law on the subject. 443 U.S. at 260 & nn. 7, 8. *PEPCO* simply did not represent the traditional admiralty rule or the prevailing law in 1972 under section 33(b). Indeed, *PEPCO* was not even a maritime case.*

---

* Section 33 was mentioned in the 1972 Amendments in section 5(b) of the Act, as noted by this Court in *Edmonds,* 443 U.S. at 260. This latter section, of course, relates solely to maritime actions involving vessels.

As shown in the prior section of this Point, *PEPCO* was noteworthy in 1972, not because it represented the rule, but because it represented an extreme exception to the rule. The rule, of course, was represented by section 33(b). The Second Circuit did not agree with the reasoning in *PEPCO* and had interpreted section 33(b) as enforceable, except in those limited situations where the unique facts of *Czaplicki* were duplicated. The Third and Fifth Circuits certainly did not agree with *PEPCO* since their rule rested upon a finding in each case, and a requirement that in each future case a finding be made, that a conflict of interest existed either due to the presence of a common insurer or due to possible liability under *Ryan*. Indeed, despite statements made in *Joyner* v. *F & B Enterprises, Inc.*, 448 F.2d 1185 (D.C. Cir. 1971), the *PEPCO* decision itself was complicated by Judge Wright's refusal to join in the judicial repeal of section 33(b). The position of the *PEPCO per curiam* opinion was also contradicted by earlier statements made by the same court in *Moore* v. *Hechinger*, 127 F.2d 746, 749 (D.C. Cir. 1942), *discussed in PEPCO*, 343 F.2d at 301 (Wright, J., concurring), wherein it was recognized both that the statute gave the assignee absolute control over the cause of action and that the language of the statute would not support any restriction of that control by permitting the joinder of the employee as a co-plaintiff.

The reasoning in *Edmonds** counsels against the interpretation espoused by petitioner. In 1959, Congress was advised of the problem of a conflict of interest, the *Ryan* decision was brought to its specific attention, and the facts of *Czaplicki* were also brought to its specific attention. Congress chose to resolve the problem by granting the

---

* *Edmonds* instructs that this Court will not modify the law which Congress relied upon when it amended the LHWCA, lest judicial change should "knock out of kilter" the delicate balance struck by Congress. 443 U.S. at 273.

longshoreman an additional period of time within which the action was his exclusively to prosecute and then, unconditionally, giving the action to the assignee. It would seem obvious that Congress intended to preserve certainty as to the proper party and also to reduce litigation. *See Sabol* v. *Merritt Chapman & Scott Corp.*, 241 F.2d at 767; *Toomey* v. *Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941). Congress did not wish to foster disharmony and thereby increase litigation, by permitting a question to remain regarding ownership of the third party cause of action.* The Congressional policy determination should be upheld and enforced by this Court. Accordingly, it would, as in the past, be appropriate for this Court to reject a theory that nowhere appears in the Act and does not comport with the Congressional intent. *See Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 271; *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 278-279 (1977).

As was recognized by this Court in *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980) (a case also involving

---

* *White* v. *United States*, 507 F.2d 1101 (5th Cir. 1975), is an example of the confusion and problems generated by a continuing conflict-of-interest exception. There, the emloyee commenced no suit in the 6-month period. The shipyard-statutory assignee commenced an action under §33(b) against the manufacturer of the lamp which exploded aboard a vessel injuring White. Thereafter, the shipyard was impleaded by the vessel in a suit commenced by White after the 6-month period. The question for the Fifth Circuit was phrased as follows:

> "What happens, if, as here, the statutory assignee has a conflict of interest (and fails to act) as to one likely defendant but has no adverse interest as to (and sues) another? Is there a statutory assignment of the cause which the assignor sued on, of that he did not sue on also, or of neither?" 507 F.2d at 1103.

The court permitted both actions to proceed, noting that procedural pitfalls might lie along the paths of these duplicative litigations.

section 33 of the LHWCA) it would be erroneous to conclude, following the 1972 Amendments, that the Congress intended to encourage third party litigation. The Court there stated:

> "Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, not injured longshoremen. The Senate Report stated that '[t]he social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.' [S. Rep. No. 92-1125, p. 4 (1972).]" 445 U.S. at 83-84. *Accord, Johnson* v. *Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244, 1249 (7th Cir. 1980).

Clearly, in 1972 Congress made an important policy determination that longshoremen's remedies should be more closely covered by Workmen's Compensation benefits rather than by burdensome and ultimately ineffective litigation. Such a restriction is intended to place the cost of accidents on employers except in those situations where a vessel's negligence substantially* contributed to the happening of the accident. This restriction of litigation was, in turn, intended to husband the resources of both the shipowner and stevedore to finance the vast improvement in compensation benefits provided by the Amendments. It is the vessel's resources which are ultimately taxed by the LHWCA since the stevedore's compensation costs are passed on to customers in the stevedore's rates. *See, e.g.*, Hearings, 84th Cong. at 100.

---

* *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 260, 265 n.15, 271 n.30.

This Court has already explained the operation of section 33 of the LHWCA in accordance with its plain language:

> "The Act provides a comprehensive scheme governing an injured longshoreman's rights against the stevedore and shipowner. The longshoreman is not required to make an election between the receipt of compensation and a damages action against a third person, 33 U.S.C. § 933(a). *After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third party. 33 U.S.C. § 933(b). If he fails to seek relief within that period, the acceptance of the compensation award operates as an assignment to the stevedore of the longshoreman's rights against the third party.*" (emphasis added).

Bloomer v. *Liberty Mutual Insurance Co.*, 445 U.S. at 77-78. *See also Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 269. In *Bloomer*, this Court also noted that the interests of the employer and the longshoreman are no longer conflicting because both stand to gain from a recovery against a shipowner through a meritorious cause of action. 445 U.S. at 84-85. This recognition removes the basis for the decisions of both the Third (*Johnson*) and Fifth (*McClendon*) Circuits as well as by this Court in *Czaplicki*.

Section 33(b) of the LHWCA should be interpreted as written so that the Congressional interest in providing certainty as to the proper party to bring suit and avoiding complicated and continuing questions on this issue may be furthered. Such an interpretation would also further the Congressional intent to reduce litigation by allowing the employer or the employer's insurer, to evaluate a claim,

which an employee has allowed to lay dormant, and determine whether the injuries are sufficiently significant or the cause of action sufficiently meritorious, to justify the commencement of a lawsuit. *See Johnson v. Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244 (7th Cir. 1980).

It is important to note that the primary purpose for the continuation, in 1972, of the negligence liability of vessels was to encourage safety because the vessel "will still be required to exercise the same care as a land-based person in providing a safe place to work." H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess., at 6. This purpose is not contravened by a reading of section 33(b), as espoused by the respondent, since the negligence liability of the vessel is not extinguished, and can be enforced by a timely lawsuit.

Recognition that the Congress abrogated any conflict-of-interest exception by the 1959 amendments to the Act also does not work a harsh or incongruous result. As was recognized by the Second Circuit, the longshoreman is given an ample period of time within which to bring suit without any interference by the employer. In the case of Petitioner Barulec, that period exceeded 18 months after the injury. Petitioner Rodriguez had more than twenty months and Petitioner Perez had more than two years after their respective injuries within which to bring suit. Moreover, Congress, in 1972, purposefully sought to reduce this third party litigation by at once increasing the benefits under the LHWCA, thereby making it the primary source of compensation to the employee, and by eliminating both the unseaworthiness and indemnity causes of action which originated in this Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 25 (1946), and *Ryan Stevedoring Co., Inc.* Encouragement of such dilatory claims would hardly comport with this Congressional intent.

It should not need saying that the LHWCA is preeminently a compensation act, not a liability act. When it is construed liberally to effectuate its purposes, it is those purposes that deal with the prompt, adequate and uncomplicated payments of compensation to the injured worker that are intended. Both *PEPCO* and *McClendon* sought support for their construction of section 33(b) in cases which liberally construed the LHWCA to effect the prompt, adequate and uncomplicated payment of compensation.* The third party cause of action has never been viewed by Congress as especially vital to the humane interests sought to be furthered by compensation. Accordingly, that action was wholly removed from the employee by the original LHWCA once compensation was paid. The employee gradually received additional rights to prosecute the action, but those rights have always been limited by the assignment provision.**

Even when this Court is confronted with a question of statutory interpretation involving the payment of compensation, this Court has been careful to avoid interpreting the Act in a manner which would be destructive of Congressional determinations. *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952) is particularly instructive regarding the limits on judicial interpretation in the area of payment of compensation, and *a fortiori* in a case such as this one which does not involve such an issue:

---

* *PEPCO* and *McClendon* also did not discuss the legislative hearings which, beyond peradventure, establish that the 1959 Amendments were drawn to remedy the conflict-of-interest problem.

** As noted in *Edmonds*, Congress, in 1972, eliminated the longshoreman's cause of action in unseaworthiness. Indeed, one of the original bills introduced in 1972 would have eliminated all third party causes of action against vessel owners by defining vessels as employers. 443 U.S. at 264 n. 12.

> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all." 342 U.S. at 200.

Here, as in *Rasmussen, supra,* Congress could have but did not add a provision, as to revesting or reassignment, as suggested by the petitioner. Moreover, the legislative history commands the recognition that Congress' choice in retaining section 33(b) and incorporating a reference to it in section 5(b) was intentional and must, therefore, be enforced.

POINT II

If an Exception to Section 33(b) Exists, That Exception Is Limited to the Exception Stated by This Court in *Czaplicki* v. *Hoegh Silvercloud* and Petitioner Has Failed to Prove Facts Bringing the Claim Within the Exception.

Petitioner urges this Court not only to find a limited exception to section 33(b) but also to go further and follow *PEPCO,* thereby abrogating the assignment provision entirely. Alternatively, petitioner urges this Court to find that fear of damaging customer relations is a sufficient conflict of interest to allow the commencement of his suit more than eighteen months after the expiration of the statutory six-month period.

A review of this Court's opinion in *Czaplicki* v. *Hoegh Silvercloud,* reveals that there were two considerations of paramount importance to the Court's holding. First, unlike

the usual case, the right to the third party action was held by the party most likely to suffer if those rights were successfully enforced. This factor conflicted with what this Court found to be a presupposition of the statute, namely, that the assignee's interests will not be in conflict with those of the employee. Such a conflict, alone, together with inaction by the assignee, however, was not the only relevant consideration. In addition, this Court looked to the statute itself finding that an assignment had occurred but that the employee could, nonetheless, still press the third party action because "in the peculiar facts here there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action." 351 U.S. at 532-33.

The possibility of inaction on the part of the assignee or action limited to the amount of the compensation lien only, was recognized by Congress in 1959 resulting in the inclusion of a one-fifth bounty to provide an incentive for the assignee to prosecute the claim, assuming it was meritorious. So too, Congress eliminated the situation which occurred in *Czaplicki* where, the insurer forced an award, as was suggested in *American Stevedores* v. *Porello,* 330 U.S. at 455, by filing a notice with the Compensation Commission that any compensation claim would be controverted. 351 U.S. at 525 & n. 2. The result was that the third party claim in *Czaplicki* was assigned within three weeks after the accident by the filing of a compensation award. Presumably, *Czaplicki* was disabled at the time, in need of funds and unaware that the statutory assignee also insured one of the third parties in the third party action.

The situation in *Czaplicki* has hardly been duplicated here. The only conflict of interest which the petitioner points to is an asserted reluctance to bring suit because of a fear that such suit would damage customer relations. No

proof was submitted in support of that proposition to the district court. All that was submitted was an attorney's hearsay affidavit purporting to summarize a conversation had between the plaintiff's attorney and a claims attorney for the insurance company which paid workmen's compensation benefits. Such evidence is clearly insufficient to defeat a motion for summary judgment. F.R.Civ.P. 56(e). Nonetheless, the district judge allowed petitioner 45 days within which to submit competent evidence establishing the existence of a conflict of interest. Upon petitioner's failure to present such evidence, respondent's motion for summary judgment was granted. Even assuming the continued viability of the conflict-of-interest exception announced in *Czaplicki,* therefore, the granting of summary judgment in this matter was entirely correct.

Regardless of the sufficiency of the proofs submitted in opposition to the respondent's motion for summary judgment, the argument that business interests present a sufficient conflict of interest must be rejected. The business interests of the employer and its customer are plain and existed in 1927, 1938, 1959 and 1972. In none of these instances did the Congress see fit to amend the statute, repealing the assignment provision. Indeed, as was earlier noted, during the hearing in May 1956, this possibility was explored. *See* Hearings, 84th Cong., at 43-45. An interpretation of section 33(b) which would permit the avoidance of the assignment because of business interests would result in the nullification of section 33(b) entirely, because "every stevedore would prefer not to give offense to its customer." *Hernandez* v. *Costa Armatori, S.p.A.,* 467 F. Supp. 1064, 1067 (E.D.N.Y. 1979), *aff'd mem.,* 622 F.2d 573 (2d Cir. 1980).

This case is also significantly different than *Czaplicki* because here there was a procedure by which petitioner

could have secured his share in the proceeds of any third party action. Simply stated, petitioner had 18 months within which to commence a third party action without interference or control by his employer or the employer's insurer. Unlike *Czaplicki,* petitioner was not forced to assign his claim within three weeks after his injury.

Petitioner emphatically cites and quotes from *Valentino* v. *Rickmers Rederei, G.M.B.H.,* 552 F.2d 466 (2d Cir. 1977), for the proposition that stevedores do not as a practical matter pursue these lawsuits "presumably for fear of antagonizing their customers." 552 F.2d at 469. In *Valentino,* the court granted the plaintiff's attorney a fee out of a judgment which was less than the stevedore's lien. Thus, the attorney's fee was given priority over the stevedore's lien in the distribution of the judgment in the third party action. The court premised this holding on the finding that "with the abolition of the *Ryan* action in 1972, there is no longer a conflict of interest between stevedore and longshoreman calling for a contrary result." 552 F.2d at 470. It can only be assumed that plaintiff's attorney in *Valentino* did not raise the same argument which is raised by petitioner's attorney in this case, *i.e.,* that the stevedore's business relations place it in a conflict of interest with the employee regarding third party causes of action. Of course, if plaintiff's attorney had urged that argument in *Valentino,* the court might very well have found, assuming it accepted this dubious argument, that plaintiff's attorney should not be given a fee because it would simply charge the stevedore for the privilege of having its business relations damaged. *See* 552 F.2d at 470. The argument would have been disingenuous in *Valentino.* It is no less disingenuous in this case.

Petitioner's argument regarding the adoption by this Court of the rule in *PEPCO* is premised upon the assertion

that *PEPCO* represented the traditional admiralty rule or the prevailing law in 1972, when Congress enacted amendments to the LHWCA. As demonstrated in Point I, this argument is untenable. *PEPCO* was alone in its interpretation of the exception, if any, to be accorded to section 33(b). The other circuits which ruled on the issue prior to 1972 all agreed that a specific conflict of interest must be shown before the assignment could be avoided. Petitioner has failed to demonstrate such a specific conflict of interest in this case.

Finally, should this court find that there is a conflict of interest-exception to section 33(b), it is respectfully submitted that the allocation of the burden of proof on this issue was properly stated by the district court in one of the three cases here under review. Supp. App. to Pet. for Cert. 1e, 29e & n.10; 1f, 8f-11f; 1g, 15g. Simply stated, petitioner seeks to benefit from an exception to an otherwise applicable statutory rule. It is entirely appropriate that the burden of demonstrating that he is exempt from the statutory assignment fall squarely on the shoulders of the party asserting the exemption, *viz.* the petitioner. *See, e.g., Westchester Rockland Newspapers, Inc.* v. *Kimball,* 50 N.Y.2d 575, 430 N.Y. Sup. 2d 574 (1980).

Petitioner has failed to demonstrate a direct conflict of interest between himself and the assignee of the third party cause of action. Accordingly, under the decisions of this Court in *Czaplicki* and the overwhelming majority of circuit courts which have discussed this issue, further inquiry into the motives of the assignee is inappropriate. Petitioner, having had an opportunity to commence and prosecute this action for 18 months after his accident, is not now permitted to attack the validity of the assignment of a cause of action which he chose to ignore while it was his to prosecute.

CONCLUSION

Summary Judgment in Favor of the Respondent Should Be Affirmed.

Respectfully submitted,

FRANCIS X. BYRN
Attorney for Respondent

JOHN M. TORIELLO
Of Counsel

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

Docket No. 79-1977

In the Supreme Court of the United States

October Term, 1980

FREDERICO RODRIGUEZ,
Petitioner,

vs.

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF FREDERICO RODRIGUEZ, PETITIONER,

Harry M. Philo, President
409 Griswold Street
Detroit, MI 48226

Arthur Roth, Chairman,
Admiralty Law Section
1111 Ainsley Bldg.
14 Northeast 1st Avenue
Miami, Florida 33132

C. Arthur Rutter, Jr.
John H. Klein
Breit, Rutter & Montagna
415 St. Paul's Blvd.
Norfolk, Va. 23510

TABLE OF CONTENTS

	Page
Consent of Parties	1
Statement of Interest.	2
Questions Presented	2
Summary of Argument	3
Argument	4
Conclusion	19

TABLE OF CITATIONS

Cases:	Page
American Stevedores v. Porello, 330 U.S. 446 (1947)	16,18
Brusich v. Grace Line Inc., 556 F.Supp. 48 (S.D.N.Y. 1944).	17
Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980)	5,9,10, 14,15
Castro v. United States, 230 F.Supp. 967 (D.P.R. 1964) . . .	9
Clark v. Hutchison, 161 F.Supp. 35 (D. Canal Zone, 1957). . . .	9,10
Czaplicki v. The Hoegh Silver-cloud, 351 U.S. 525 (1956). . .	12
The Etna, 138 F.2d 37 (3rd Cir. 1943).	7
Grasso v. Lorentzen, 149 F.2d 127 (2d Cir. 1945)	16
Iaria v. Silver Line Ltd., 56 F. Supp. 42 (S.D.N.Y. 1943).	17
Italia Societa Per Azioni De Navigazione v. Oregon Stevedore Inc., Co., 376 U.S. 315 (1964).	5
Jay v. Chicago Bridge and Iron Co., 150 F.2d 247 (10th Cir. 1945)	15

Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980). . 6

Johnson v. Sword Line, 146 F.Supp. 940 (E.D. Pa. 1956), 257 F.2d 541 (3rd Cir. 1958) 13,14, . . 15

Joyner v. F & B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971). 9

Lindler v. District of Columbia, 502 F.2d 495 (D.C. Cir. 1974) . 5,9

MaGee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950) 15

McClendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965) 14

Neri v. Erie Railroad Company, 199 Misc. 374, 101 N.Y.S. 2d 133 (1950) 18

Northeast Marine Terminal Company Inc., v. Caputo, 432 U.S. 249 (1977) 5

The Owen, 43 F.Supp. 897 (E.D. Pa. 1942) 8,15

Potomac Electric Power Company v. Wynn, 343 F.2d 295 (D.C. . . Cir. 1965). 5,8,15

Roeben v. United States, 113 F.Supp. 732 (D.N.J. 1953) . . . 8,17

Romano v. United States, 90 F.Supp. 15 (S.D.N.Y. 1950). . . 18

Sea Quest Marine Inc. v. Cove Shipping, Inc., 474 F.Supp. 164 (W.D. Wash. 1979) 18

Sessa v. Weeks Stevedoring, 56 F.Supp. 50 (S.D.N.Y. 1943) . 17

Tevington v. International Milling Co., 62 F.Supp. 462 (W.D.N.Y. 1945) 18

Valentino v. Rickners Rhederei G.M.G.H., 552 F.2d 446 (2d Cir. 1977) 14

Voris v. Eikel, 346 U.S. 328 (1953) 5

White v. United States, 507 F.2d 1107 (5th Cir. 1975) . . . 14

Statutes:

33 U.S.C.:
Section 914 16
Section 919 16
Section 933(b) 4

Other:

Larson, The Law of Workmen's Compensation (1976) 7

H. Rep. No. 92-1411, 92nd Cong. 1st Sess. 6

No. 79-1977

In The

Supreme Court of the United States

October Term, 1980

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF FREDERICO RODRIGUEZ, PETITIONER,

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U. S. Supreme Court Rules, this Brief Amicus Curiae is being filed with the written consent of all parties to the case, copies of which are being separately filed with the Court.

STATEMENT OF INTEREST

This Brief Amicus Curiae is being submitted by the Admiralty Law Section of The Association of Trial Lawyers of America, a national Bar Association consisting of more than 40,000 lawyers who primarily represent plaintiffs in personal injury and death litigation and workmen's compensation. The Admiralty Law Section includes most of the attorneys throughout the United States who specialize in Maritime Personal Injury Law.

The pending case is of great importance and will decide the maritime law on the question presented. It will affect the welfare of many plaintiffs in maritime cases now pending throughout the United States.

We believe that based on our research and analysis of the law and our experience in the maritime law and the interests of safety of workmen on board vessels, that our brief argument will be of assistance to the Court.

Our Brief will be limited to the following questions presented without any reference or review of the facts.

QUESTIONS PRESENTED

1. When there is a statutory assignment under 33 U.S.C. §933(b) of a longshoreman's right to sue a negligent third party, and the employer fails to prosecute the third party claim, does the longshoreman retain the

right to sue in his own name?

2. Where there is a conflict of interest between the longshoreman and the employer, and the employer fails to sue a negligent third party, may the longshoreman bring such a suit in his own name even after six months after an award in a compensation order?

3. Is there an "award in a compensation order filed by the Deputy Commissioner or Board" so as to trigger the assignment provision of 33 U.S.C. §933(b) by the mere acceptance of compensation without action by the Deputy Commissioner?

SUMMARY OF ARGUMENT

1. The Longshoremen's and Harbor Workers' Compensation Act, which is to be liberally construed in favor of the injured employee and which intends to place the burden on the company causing the employee's injury, should be construed to permit longshoremen to sue negligent third parties even more than six months after an award of compensation, where the employer does not bring the action. Such a rule serves the Congressional intent to foster safety in maritime employment.

2. Where there is a conflict of interest between employer and employee, the Czaplicki case provides an exception to the assignment provision of the Longshoremen's Act. Similarly, where employers decline to sue their business customers, the vessel owners, the long-

shoreman should be able to sue. In recognition of this "business decision" not to sue vessel owners, the Court should recognize that employers may reassign the right to sue back to the longshoreman or otherwise waive the assignment provision, so the longshoreman may maintain an action.

3. Where there is no action by the Deputy Commissioner, there is no "award in a compensation order filed by the Deputy Commissioner" so as to trigger the statutory assignment. Some action by the Deputy Commissioner is necessary, beyond a longshoreman's mere acceptance of compensation and beyond preparation of papers by claims examiners in the Labor Department. Since the Deputy Commissioner did not act, there has been no assignment in the cases before the Court.

ARGUMENT

1. WHEN THERE IS A STATUTORY ASSIGNMENT UNDER 33 U.S.C. §933(b) OF A LONGSHOREMAN'S RIGHT TO SUE A NEGLIGENT THIRD PARTY, AND THE EMPLOYER FAILS TO PROSECUTE THE THIRD PARTY ACTION, THE LONGSHOREMAN RETAINS THE RIGHT TO SUE IN HIS OWN NAME.

The Longshoremen's and Harbor Workers' Compensation Act provides in §33(b) that:

> "acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner or Board shall operate as

> an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

In approaching the issues posed by these consolidated appeals this Court's analysis must begin with the well established principle that the Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of injured employees. Northeast Marine Terminal Co., Inc., v. Caputo, 432 U.S. 249 (1977); Voris v. Eikel, 346 U.S. 328 (1953). A narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties. Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965); Lindler v. District of Columbia, 502 F.2d 495, 499 (D.C. Cir. 1974).

Considerations of policy favor a rule which permits suits by longshoremen against negligent third party. It is one of the objectives of the Longshoremen's Act to place "the burden ultimately on the company whose default caused the injury." Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Company, 376 U.S. 315, 324 (1964); Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980).

Permitting negligence actions against vessel owners by longshoreman for more than the six month period will foster the increased safety in maritime employment which was desired by Congress. Increased safety is fostered because vessel owners will be encouraged to remedy dangerous conditions on board their vessels in order to avoid facing suits by longshoremen who suffer injury. The legislative history of the 1972 Amendments to the Longshoremen's Act indicates that the overriding purpose of the Amendments was to create incentives for safety in the nation's second most dangerous profession. Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980). The following language from the House report is instructive:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." H.Rep. No. 92-1441, 92nd Cong., 1st Sess.

It is also useful to consider the purpose of the assignment provision contained in the Longshoremen's Act.

"The concept underlying third party actions is the moral idea that the ultimate loss from wrong doing should fall upon the wrong doer. ... So, it is elementary that if a stranger's negligence was the cause of injury to claimant in the course of employment, the stranger should not be in any degree absolved of his normal obligation to pay damages for such an injury." Larson, The Law of Workmen's Compensation (1976), §71.10. The courts have applied this view when interpreting the assignment provision of the Act, concluding that the purpose of that section is to protect the employer's rights. In The Etna, 138 F.2d 37, 40 (3rd Cir. 1943), the Court said:

> "The reason for the assignment which the law thus afforded is apparent. An injured employee, especially once he has received compensation, may have neither the incentive nor the desire to press his right of action against the third persons responsible for his injury. Hence, the law passed to the employer the control of the employee's right of action against third persons once the employee accepted compensation."
>
> "The third party tort fessor was not the party sought to be protected by this provision of the Act and is given no ground thereunder to say which of two persons who may be entitled under the law

> to maintain an action against him may do so, except to the extent that he is entitled to protection against being exposed to action by both." The Owen, 43 F.Supp. 897 (E.D. Pa. 1942). See also Roeben v. United States, 113 F.Supp. 732, 734-35 (D.N.J. 1953).

The purpose of §933 then is not to relieve third party tort feasor of the responsibility or wrongful acts injuring employees. Public policy as contained in the Longshoremen's Act is to require payment by wrongdoers for their wrongful conduct against workers. It is within this context that courts have permitted longshoremen to sue third parties more than six months after a compensation award, the assignment provision of the Act notwithstanding.

In Potomac Electric Power Co., v. Wynn, supra, the Court of Appeals for the District of Columbia focused upon the fact that the Longshoremen's Act assignment provision is not designed to protect third parties from suit. The purpose of the assignment provision is only to safeguard the employer's right to recoup his compensation payment. Therefore the Court concluded that the employer's declination to sue amounts to a waiver of the protection afforded by the statutory assignment. The Court reasoned that since the employer had not instituted suit or secured a compromise of the claim against the negligent third party within a reasonable time after the statutory assignment to

him, the Court would permit the injured worker to bring suit in his own name within the period of the statute of limitations. The Court reasoned that the Longshoremen's Act provided that the employer could either institute proceedings or compromise with the third person but the Act did not permit the employer to abandon the action entirely. The same rule continues to be followed by the District of Columbia Circuit. See Joyner v. F and B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971), where the Court declared, "It is settled that an injured employee may bring suit against a third party whenever it is evident that the employer-assignee for whatever reason does not intend to bring suit." Id. at 1187. See also Lindler v. District of Columbia, supra.

Other courts have also approved such an approach to the question of whether the longshoreman may maintain his own action after the six month time period. See Clark v. Hutchison, 161 F.Supp. 35 (D.C. Canal Zone 1957), where the Court viewed the right to sue as a concurrent right shared by the longshoreman and the employer. See also Castro v. United States, 230 F.Supp. 967 (D.P.R. 1964), where the longshoreman was permitted to file suit against the United States more than six months after an award of compensation because no third party suit had been filed by the employer and the statute of limitations had almost run on the claim.

Accordingly, the Court of Appeals for the Fourth Circuit in Caldwell v.

Ogden Sea Transport Inc., supra, concluded that the right to action against third parties may be re-vested in the longshoreman when it becomes manifest that the assignee (employer) with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This view is in keeping with the requirement that the Act be liberally construed in favor of employees and in keeping with the congressional intent to foster safety on the water front. This Court should refuse to divest the longshoreman of his right to sue where the employer, despite assignment, remains inactive and leaves the right to sue lying idle.

This conclusion is further buttressed by the provisions of Rule 17(a) of The Federal Rules of Civil Procedure. The Rule requires that every action be prosecuted in the name of the real party in interest. Under §33(e) of the Longshoremen's Act, any recovery made by the employer shall be distributed according to a statutory scheme. The employer retains one fifth of the excess of any recovery over the compensation lien and the expenses of suit. The remainder of any recovery belongs to the injured employee. Thus the longshoreman clearly retains an interest in the outcome of the suit even when it is brought by the employer. This real interest remaining in the employee even after the statutory assignment should be sufficient to entitle the longshoreman to continue his participation in the suit. Clark v. Hutchinson, supra.

The ruling in PEPCO, supra, largely followed in Caldwell, should be followed by this Court because PEPCO was the prevailing rule prior to the 1972 Amendments to the Lonsghoremen's Act. ATLA members regularly practiced in the maritime field under the perception that courts would not cut off a longshoreman's right to sue after six months. Not until the District Court decisions which resulted in Caldwell in the Fourth Circuit and Rodriguez in the Second Circuit did ATLA members believe that injured longshoreman had only six months to sue. In view of the existence of the PEPCO rule at the time of the 1972 Amendments, it is doubtful that Congress had any idea that longshoremen would be held to a six months statute of limitations. Since Congress made no change in the prevailing rule in the comprehensive amendments it under took in 1972, this Court should presume that Congress was content with the PEPCO rule. This is all the more true since the LHWCA serves as the workmen's compensation statute for the District of Columbia. In fact, more workmen are covered in the District of Columbia than are covered as "pure longshoremen". Thus the previously accepted rule of the Court of Appeals for the District of Columbia Circuit in PEPCO should be changed by this Court only upon clear evidence of Congressional intent. The Congressional silence shown in the 1972 Amendments should be taken as acquiescence in the PEPCO rule.

2. WHERE THERE IS A CONFLICT OF INTEREST BETWEEN THE LONGSHOREMAN AND THE EMPLOYER, AND THE EMPLOYER FAILS TO SUE A NEGLIGENT THIRD PARTY, THE LONGSHOREMAN MAY BRING SUCH A SUIT IN HIS OWN NAME EVEN AFTER SIX MONTHS AFTER AN AWARD IN A COMPENSATION ORDER.

Where there is a conflict of interest between the employer and the longshoreman, the right to sue the negligent third party should be deemed to continue in the longshoreman. This Court's holding in Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956) supports such a holding. There, the employer's compensation carrier was also the liability carrier for the third party to be sued. The result was that the longshoreman's right of action was held by the party most likely to suffer if the action was successfully prosecuted. This Honorable Court said:

"In giving the assignee exclusive control over the right of action, however, we think that the statute presupposes that the assignee interest will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interest, the inaction of the assignee operates to defeat the employee's interest in any possible recovery. Since an action by Travelers [the carrier] would, in effect, be an action against itself, Czaplicki [the longshoreman] is the only person with

sufficient adverse interest to bring suit. In this circumstance, we think the statute should be construed to allow Czaplicki to enforce, in his own name the rights of action that were his originally." 351 U.S. at 531.

The Third Circuit Court of Appeals in Johnson v. Sword Line, 240 F.2d 954 and 257 F.2d 541 (3rd Cir. 1957), extended the Czaplicki conflict of interests rule a step further. In its first opinion the Court said that "the statutory assignee or its insurance carrier may not be permitted to stand pouting in a corner like a sulky bar maid at a barn dance and simply refuse to bring suit without adequate reason." 240 F.2d at 956. The Court noted that is was obvious that it was Congressional intent that the statutory assignee should bring suit unless there was a good reason why it should not. Id. at 956-57. Therefore, the Court in its second opinion created a presumption that there was a conflict of interest and placed the burden of proof to the contrary upon the stevedore. Therefore, unless the stevedore proved the existence of no conflict, the longshoreman would be entitled to sue beyond the six month period.

Although the Longshoremen's Act was amended in 1959 by the language which created the six month time period within which the longshoreman could bring suit before an assignment would take place, this change in the statutory language has not altered the existence of the conflict of interest exception.

See Caldwell, supra; White v. United States, 507 F.2d 1101 (5th Cir. 1975); McClendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965).

The question remains, however, of what a conflict of interest actually is. Where, as in Czaplicki, the same carrier represents the employer and the third party, the conflict of interest is clear. In addition, the courts have recognized that ordinarily a stevedore-employer will be reluctant to sue its business clients, the shipowners. See Valentino v. Rickners Rhederei G.M.B.H., 552 F.2d 446 (2d Cir. 1977). Since the longshoreman has the statutory right to receive eighty percent of the proceeds of any suit brought by the employer (after recovery of compensation payments and cost), the longshoreman's interest in pressing the suit can obviously conflict with the employer's interest in not antagonizing its business customer, the vessel owner. This Court should recognize that fact of business life and extend Czaplicki to protect longshoremen where the employer declines to sue. A rule recognizing a presumption of a conflict of interest as in Johnson v. Sword Line, supra, would seem appropriate. In such a situation, unless the employer could show no conflict of interest had precluded him from bringing suit, the longshoreman would be permitted to continue with the action.

In addition, to avoid the consequences of a "business decision" not to sue, this Court should recognize that the employer may "re-assign" its right

to sue back to the longshoreman. Such a reassignment has been recognized as acceptable by several lower courts. See Caldwell, supra, Johnson v. Sword Line, 257 F.2d at 546; The Owen, supra; Johnson v. Sword Line, 146 F.Supp. 940 (E. D. Pa. 1956); Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950). This Court should also recognize that an employer, for business interest or any other reason, may waive its assignment and permit the longshoreman to prosecute any third party action. Waiver of the statutory protection for the employer has been recognized by the lower courts. See PEPCO, supra; Jay v. Chicago Bridge and Iron Company, 150 F.2d 247 (10th Cir. 1945). These procedures would permit an employer to return the right of action to the longshoreman-employee, for such proceedings as the employee may want to undertake. Such a procedure would also recognize that the ordinary employer may wish, for business reasons, not to participate in litigation against his client and customer, the vessel owner. Yet it preserves the right of action for the employee, if he wishes to proceed.

3. THERE IS NO "AWARD IN A COMPENSATION ORDER FILED BY THE DEPUTY COMMISSIONER OR BOARD" SO AS TO TRIGGER THE ASSIGNMENT PROVISION OF 33 U.S.C. §933(b) BY THE MERE ACCEPTANCE OF COMPENSATION WITHOUT ACTION BY THE DEPUTY COMMISSIONER.

The term "Award in a Compensation Order" has a definite meaning under

the Longshoremen's Act. If there is no controversion by the employer then compensation under the Act is paid "without an award" by the employer. 33 U.S.C. §914(a), (e). In the event that an employee's right to compensation under the act is controverted by the employer, 33 U.S.C. §919 details the procedures for filing a claim with the Deputy Commissioner and a resolution of the claim before the Deputy Commissioner or an Administrative Law Judge, under the 1972 Amendments. It is only at this stage that an order making an award is entered. 33 U.S.C. §919 (c), (d), and (e).

After the 1938 Amendments to the Act, acceptance of compensation under an award in a compensation order filed by the Deputy Commissioner operated as an assignment to employer of the employee's claim against a third party. The courts were therefore called upon to determine what was "an award in a compensation order filed by the Deputy Commissioner" so as to effect an assignment of the third party claim. This Honorable Court in the case of American Stevedores v. Porello, 330 U.S. 446 (1947), said that where there was no award, mere acceptance of compensation payments itself did not preclude suit against a third party. Similarly, in the case of Grasso v. Lorentzen, 149 F.2d 127 (2d Cir. 1945), cert. denied 326 U.S. 743 (1946), the court said that the language and the legislative history of the 1938 Amendment showed that it intended to make the assignment provision effective only when compensation was accepted in accordance with

such an award. The court concluded that there must be some official action by the Deputy Commissioner establishing an award of compensation in order to make acceptance an assignment of the employee's cause of action against a third party. The Second Circuit concluded that although the award may be informal, it must amount to an award by the Deputy Commissioner. 149 F.2d at 129.

Several courts were faced with the question of whether compensation had been accepted under an award so as to effect an assignment of the third party claim. In Sessa v. Weeks Stevedoring, 56 F.Supp. 50 (S.D.N.Y. 143), the Court held that a memorandum of conference by a claim's examiner did not constitute an award, so there was no assignment. In Iaria v. Silver Line, Ltd., 56 F.Supp. 42 (S.D.N.Y. 1943), where the longshoreman never had a formal hearing or accepted compensation payments under a formal award by a Deputy Commissioner, the longshoreman was not precluded from suit. In Roeben v. United States, supra, the court noted that an award must be in the form of a compensation order, filed by the Deputy Commissioner himself, not by a mere underling. The Court said that Congress had made clear beyond doubt its intent that until such condition occurred, there was no divesting of the employee's right to sue. 113 F.Supp at 735. In accord Brusich v. Grace Line Inc., 56 F.Supp. 48 (S.D.N.Y. 1944).

The same reasoning was applied by the Court in Sea Quest Marine Inc. v. Cove Shipping Inc., 474 F.Supp. 164 (W.D. Wash. 1979), in which the Court concluded that a memorandum of informal conference in which the claim's examiner recommended continuing payment of compensation pending a second medical examination was not an award so as to trigger the assignment under §933(b). This Court should recognize the long series of cases dating back to this Court's 1947 decision in American Stevedores v. Porello, that unless the Deputy Commissioner enters an award of compensation, mere receipt of compensation payment does not constitute an award. See also Neri v. Erie Railroad Company, 199 Misc. 374, 101 NYS 2d 133 (1950); Romano v. United States, 90 F.Supp. 15 (S.D.N.Y. 1950); Tevington v. International Milling Company, 622 F.Supp. 462 (W.D.N.Y 1945). Similarly, this Court should recognize the longstanding rule that an award requires action by the Deputy Commissioner himself, not by a mere underling. Where the Deputy Commissioner has not acted, there is no award which triggers the assignment provision of §933(b). Where an employee's right to sue a negligent third party is going to be cut off, this Court should require strict compliance with the clear language of Congress. It is only where an award is entered by a Deputy Commissioner that a longshoreman should expect an assignment of his cause of action. Where there has not been action by the Deputy Commissioner, the longshoreman would not expect his cause of action to be assigned. This Court should recognize

the reasonableness of such an expectation and should require that prior to any assignment there be clear action by the Deputy Commissioner.

CONCLUSION

For the reasons stated, this Court should permit longshoremen to maintain actions against negligent third parties even though an assignment may occur pursuant to §933(b) of the Longshoremen's Act. The Court should also recognize that conflict of interest for business reasons is sufficient to permit the longshoreman to maintain such a negligence action even after six months. The Court should also recognize that the employer may re-assign the cause of action to the longshoreman or otherwise waive the statutory assignment protection to permit the longshoreman to sue the third party. Finally, unless there is action by the Deputy Commissioner, there is no award so as to trigger the statutory assignment provision in the first place. Accordingly, the Court should conclude that the petitioners in the instant matters retain the right to sue the respective vessel owners for the personal injuries petitioners received. The decision of the Second Circuit Court of Appeals should be reversed and remanded so these matters can go forward for trial on the merits.

Respectfully submitted on behalf of the Association of Trial Lawyers of America, Harry M. Philo, President,

Arthur Roth, Chairman,
Admiralty Law Section.

C. Arthur Rutter, Jr.,
Vice Chairman, Admiralty
Law Section, of counsel.

John H. Klein, of counsel.
Breit, Rutter & Montagna
415 St. Paul's Blvd.
720 Atlantic National Bank
Bldg.
Norfolk, VA 23510

By John H. Klein

By